Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DOROTHY SANCHEZ, individually
and as next friend of Lisa Sanchez,
Petitioner,

v.

GILBERT BACA, Captain, et al.,
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Where the police, investigating an inflammatory campus flyer, obtained three search warrants during one week of the home of a college administrator, resulting in the loss of her 24 year career; with no charges ever filed; was summary judgment properly entered against her where she presented deposition evidence that:

(1) her retained police expert's opinion was that respondent policemen acted below a reasonable standard and were acting in concert with a hostile college administration;

(2) the police seized personal mementos, financial records, tax returns, and her home computer from her home; held them for 9 to 15 months before returning the litigation, with no charges resulting;

(3) that the respondent police misrepresented on the warrant affidavit that Petitioner's home computer was the likely source of the campus flyer;

(4) that the police respondents seized "anything that look financial";

(5) that the warrants lacked minimal specificity and probable cause;

(6) that Petitioner had criticized the college administration at a public forum the month before they showed the police to her office and terminated her after the searches?

Additional issues are:

(7) Did the Court of Appeals fail to give proper consideration of their appeal in view of the Tenth Circuit Local rule that requires individuals to file a single brief, while allowing government agencies separate briefs?

(8) Did the Court of Appeals improperly accept respondent's baseless assertions that Petitioner was "under investigation," was engaged in wrongful conduct; where Petitioner had no hearing on any charge, affirmatively or defensively and such assertions were not supported documented in the record?

II. Was Petitioner entitled to a trial on this record for her theory that respondent policeman's campus investigation was exaggerated and overzealous and was improperly used by the college administration to silence critics?

PARTIES TO THE PROCEEDING

Petitioner

Dorothy Sanchez, individually and as next friend of Lisa Sanchez. Petitioner is an individual and has no corporate affiliations.

Respondents

Gilbert Baca, Captain; New Mexico Department of Public Safety; Selmino Rael, President, New Mexico Highlands University; Margaret Garza, Dr.; Gary Smith, Lieutenant; Wilton Rogers; New Mexico Highlands University.

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Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming the granting of summary judgment on all counts raised by Petitioners.[1]

OPINIONS BELOW

The opinion of the District Court for the District of New Mexico is not reported. It is included in the Appendix at App. B at 9a.[2] The opinion of the United States Court of Appeals for the Tenth Circuit is not reported. A copy of the opinion is included in the Appendix at App. A at 1a. A petition for rehearing was denied on July 23, 1999, with the granting of the filing Appellant's reply brief as separate documents. See Point I, infra. A copy of the denial is included in the Appendix at App. D at 19a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its opinion on June 9, 1999. A Petitioner for

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[1] Petitioner Dorothy Sanchez is the subject of the majority of claims. Co-Petitioner, Lisa Sanchez's interests relate to the seizures of her property, i.e., school work and memorabilia, together with searches of her home and bedroom.

[2] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i). Citations to "Aplt. App." are to the appendix filed with the Tenth Circuit Court of Appeals which has been lodged with the Clerk of this Court, pursuant to the Clerk's instructions.

Rehearing and Suggestion for Rehearing En Banc was denied by that Court on July 23, 1999. This Petition for Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances."

Amendment IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[3]

Amendment V: "No person shall be held to answer for a capital or other infamous crime, . . . nor be deprived a life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

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[3] The two warrants in question of May 3, 1996, are included at App. F.

Tenth Circuit Rule 31.4 states, "all parties on a side . . . except a government entity must join in a single brief to the greatest extent practicable."

STATEMENT OF THE CASE

Petitioner Dorothy Sanchez was the Director of Student Support Services for New Mexico Highlands University for 24 years, and was former New Mexico Woman of the Year. Aplt. App. 447. She was third in the chain of command and the highest ranking member of the previous administration. In the space of two weeks, her home was searched three times, and personal belongings seized; her office searched twice, she was suspended and then terminated from her career position. No charges, criminal, civil, or administrative were ever brought against her.

Petitioner brought an action in the United States District Court under 42 U.S.C. Section 1983 against the police and university Respondents. Pretrial filings included material from 30 depositions, including a police procedures expert, and the federal monitor of the funds which Petitioner administered, as well as an affidavit from the former president of the University. The district court granted summary judgment to Respondents on all claims, and the Court of Appeals affirmed. Petitioner should be given a forum in which to present her claims.

In the 1995 to 1996 school year, Respondent Rael was named University President from within the Administration. Sanchez was the highest ranking member of the previous administration, administering a $400,000 federal grant and had substantial autonomy. Aplt. App. 490. Some student and faculty agitated for a nation wide search for a new president, and protested various policies. Several flyers and circulars

critical of the administration were distributed, typical of a college campus. Among the flyers was one racially inflammatory circular threatening the safety of certain members of the administration. The police were called. Aplt. App. 757, 553.

Respondent Gary Smith, a uniformed state policeman, was assigned. He was given an office near the University President, Respondent Rael, who described Sanchez in an initial meeting as an opponent of his administration. Aplt. App. 79. Rael and his staff arranged for Smith's interviews with some of Petitioner's co-workers and subordinates. Smith never interviewed Petitioner. Aplt. App. 297, 442.

Petitioner retained D.P. VanBlaircom, a nationally known police procedures expert. He testified in deposition that Lt. Smith, who had no similar experience, was out of his depth on campus, and conducted an inept investigation which focussed on the administration's critics, particularly Petitioner. Aplt. App. 167, 168. Mr. VanBlaircom testified that Respondent Smith was overzealous, lacked probable cause for the second and third search warrants, and was attempting to find any crime with which to charge Petitioner rather than trying to solve the crime for which he had been called; and was used by the Administration in the context of internecine campus rivalries. Aplt. App. 107.

On April 29, 1996, an after hours meeting was held between the police and the University administration in the President's conference room, where an agreement to search Petitioner's office and home occurred. The police reported the result of the search of Petitioner's home to the president at his office at midnight on April 28th. The President denies the midnight report. The police and University employees recall his presence. Aplt. App. 405, 557.

Lt. Smith and five other policemen searched Petitioner's home at 9:00 p.m. for the three items of school property. While the reasonability of this search -- with no previous interview with or request of the Petitioner -- is questionable,[4] Petitioner concedes that this warrant contained the requisite specificity, Aplt. App. 277: the three items were specifically identified. This stands in stark contrast to the warrants of May 3rd which authorized a classic general search.

On May 3, Respondent Smith obtained two more warrants and searched Petitioner's home two times as well as her office. Aplt. App. 281-285. Smith seized Petitioner's home computer and two cardboard cartons of personal, financial, and sentimental documents, including her surviving daughter's school work, and her deceased daughter's mementos. Aplt. App. 175. Respondent Smith held these documents for between 9 and 15 months and returned them only during the litigation. He did not file an inventory and did not return the second and third warrants to the State District Court at all. Aplt. App. 184, 154, 458.

The five policemen assisting Smith in searching Petitioner's home testified that they were told to "pick up anything that looked financial." Aplt. App. 174.

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[4] Petitioner claimed that she had permission; and that such use of equipment was common, and in any event Respondents could have made requests at any time during working hours.

Petitioner was suspended with pay to the end of the semester, and then her yearly contract was not renewed after 24 renewals. Aplt. App. 576, 543.

Petitioner was never charged with any crime: not for the circular, nor any fiscal irregularities,[5] nor unauthorized use of equipment, or any of the accusations levied by co-workers or Respondent Smith. The computer, after analysis during the 9 month seizure disclosed only personal and children's school work on it.

After the searches and attendant publicity, the investigation lapsed. There was no violence, repetition of the inflammatory flyer, nor searches of any other person, home, or office.

ARGUMENT FOR GRANTING THE WRIT

Either singly or in combination the issues raised touch the heart of American Constitutional protections: multiple police searches and seizures of a citizen's home, together with destruction a long career of public employment, without any charges or forum for vindication. This Court has reversed and remanded courts where fundamental rights or clear legal violations have been misapprehended by lower courts. See,

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[5] Contrary to the Court of Appeals acceptance that Lt. Smith had "learned through interviews ... that Sanchez had been altering documents including W-2 forms and tax returns...." See App. A at 5a, none of the alleged documents are part of the Record, nor were they produced. See Argument 10, infra.

Oestereich v. Selective Service Local Board, 390 F.2d 100 (10th Cir. 1968), rev'd, 396 U.S. 460 (1969).

ARGUMENT 1

THE COURT OF APPEALS RULE REQUIRING PETITIONER TO FILE A JOINT BRIEF MAY HAVE CAUSED INCOMPLETE CONSIDERATION OF THE APPEAL

Rule 31.4 of the Rules of the Tenth Circuit require all parties to file joint briefs, with the exception of government agencies. Each of the two groups of government Respondents, the University and the State Police, filed separate answer briefs. Petitioner's motion for rehearing noted that Petitioner's motion for leave to submit separate reply briefs had not been ruled upon, nor had the briefs, though timely submitted, been filed. The Court's order denying rehearing noted its failure to rule; granted Petitioner's motion, but noted that separate briefs by non-government parties such as Petitioner are "discouraged and are not provided for under the rules." App. D at 20a. The briefs were filed by the clerk the same day as the Petitioner for Rehearing was denied.

In view of the several factual errors and apparent misapprehensions by the Court of Appeals, it may not have had sufficient time to consider all of the facts shown in Petitioners' briefs upon which a genuine issue existed, given the 30 depositions and 800 page Appendix containing excerpts therefrom which had been filed in the District Court in cross-summary judgment motions.

The Court may also have implicitly required an improperly high standard of proof which this Court overruled in Crawford-El v. Britton, 523 U.S. 574 (1998).

ARGUMENT 2

THE COURT OF APPEALS IMPROPERLY AFFIRMED THE SUMMARY JUDGMENT IN THIS FACT INTENSIVE CASE

The numerous depositions and affidavits in the pretrial record, show that there was sufficient evidence with which to go to trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324-25 (1986). It is well settled that summary judgment draws all justifiable inferences in the favor of the non-movant and is to be used sparingly in fact intensive cases. Anderson v. Liberty Lobby, 477 U.S. 242 (1986). The motivation and credibility are generally jury issues. Crawford-El, supra, at 744; Ware v. Unitized School Dist., No. 492, 902 F.2d 815 (10th Cir. 1990); Pitasi v. Gartner Group, Inc., 184 F.3d 709, 714 (7th Cir. 1999) (review of summary judgment in credibility and intent cases are to be done with "added rigor.").

Indeed the very breadth of the facts in this two week period make both recounting by Petitioner and digestion by the reviewing court difficult, in a summary judgment proceeding. These facts included:

1. The Court of Appeals misapprehended a critical fact, asserting that "a large number of copies of the hate flyer" were discovered in Petitioner's office. Rather, Lt. Smith testified to finding only two of the inflammatory fliers. App. F. The misapprehension appears to have been based on Smith's affidavit referring to a large number of flyers of

various nature, including legitimate political expression concerning the suitability of the Respondent President.[6]

Were a large number of the inflammatory flyer found, Lt. Smith's searches of Petitioner's home would have been unnecessary. It was the lack of evidence at Petitioner's office which led Smith to attempt to find the "superior copy," which in turn led to his misrepresentation that the Petitioner's home printer was the likely source.

2. The Court of Appeals accepted Respondents' charges which had never been subject to scrutiny in any forum. These included the charge that Petitioner was under "continuing investigation," had altered documents, or was guilty of administrative misconduct. These charges are inadmissible hearsay, and are denied by Petitioner, who was never provided a forum. Such reliance by the Court is inconsistent with the letter and spirit of F.R.C.P. Rule 56, which requires admissible evidence.[7] Celotex, supra.

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[6] The Court of Appeals also omitted reference to Lt. Smith's lack of preparing and filing inventories of what was seized. Both the warrant and one office inventory he prepared failed to differentiate between the various flyers and circulars seized in the office Petitioner maintained for 24 years. Aplt. App. 177, 185.

[7] Lt. Smith was transferred shortly afterwards after trying without success to interest other federal and state agencies in prosecuting Petitioner for the variety of irregularities from Petitioner's office which he believed to evidence criminal conduct. No other agencies have filed charges of any sort.

3. Lt. Smith misrepresented having been told by the University computer expert that Petitioner's home printer was the type which could have created the flyer. See infra, pg. 14. The Court of Appeals decision did not refer to this, which creates a triable issue. Franks v. Delaware, 438 U.S. 154 (1978).

4. Petitioner had spoken in a public forum against the administration the month before the searches and her termination. The Court of Appeals erroneously claimed that Petitioner had not identified pre-termination criticism, for her retaliation claim. App. A at 7a. See infra, Pg. 19. Perry v. Sinderman, 408 U.S. 593 (1968).

5. Petitioner supplied a nationally known police procedures expert who testified that Lt. Smith's conduct was below an objectively reasonable standard in several areas, including trying to find a crime to fit the Petitioner.[8] Respondents did not supply any police expertise.

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[8] Lt. Smith told a witness that while they had no case against her, Petitioner was "very guilty," and he would continue to work to put her in jail. Aplt. App. 489.

ARGUMENT 3

THE COURT OF APPEALS FAILED TO ADDRESS THE 9 TO 15 MONTH RETENTION OF PETITIONER'S COMPUTER AND PERSONAL FINANCIAL PAPERS; PETITIONER SHOULD BE ALLOWED A TRIAL ON THAT ISSUE

Petitioner was never charged in any forum for any crime or misconduct. Respondent Smith held the computer from May to December before submitting it for a "mirror image" analysis of the hard drive; it showed only domestic details and co-Petitioner Lisa Sanchez's school work. Aplt. App. 164. He did not return it until his second day of deposition in March of 1997, 9 months after seizure. He returned the personal financial documents in August of 1997. The Court of Appeals decision does not refer to the issue. It is well settled that unreasonable retention even after an otherwise valid search is unreasonable under the 4th Amendment. See City of West Covina v. Perkins, 67 U.S.L.W. 4058 (1999); Davis v. Gracey, 111 F.3d 1472 (10th Cir. 1997).[9] Respondent Smith offered no reason for

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[9] "A failure timely to return seized material which is without evidentiary value and which is not subject to forfeiture may a constitutional or statutory claim," citing, Fed. R. Crim. P. 41, Advisory Committee Note: If the United States legitimate interests can be satisfied even if the property is returned, continued retention would be come unreasonable.

keeping the materials so long and no apologies for finding no evidence of criminal activity therein.

ARGUMENT 4

PETITIONER WAS ENTITLED TO TRIAL ON GENERAL SEARCH

The operative paragraph of the first warrant on May 3rd stated: ". . . [t]here is now being concealed: computers, and their contents and memories, typewriters, documents, printers, and any other items used to make, alter, manufacturer, delete, and/or change documents." App. F; and Aplt. App. 281-282.

During the searches of May 3rd, Respondent Smith brought other police officers and directed them as follows:

> Q. Did Gary Smith tell you how to look for any documents: did you know how to look for any documents to see if they were forged.
>
> A. No I didn't I didn't know if it had been forged or not. I was just told, if it looked to be like any sort of financial document at all to place it in this box that we had there and they would look at it.
>
> Q. So you took any type of financial looking document and left it to the state police to see if it had been forged or not.

A. Right.

Aplt. App. 174. The search was plainly a general search forbidden by the Fourth Amendment. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979), and resulted in a "general rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443 (1971).

ARGUMENT 5

THE SEIZURES OF MAY 3RD EXCEEDED THE SCOPE OF THE WARRANTS.

"If the scope of the search exceeds that permitted by the terms of a validly issued warrant . . . the subsequent seizure is unconstitutional without more." Horton v. California, 496 U.S. 128, 140 (1990). The result of the general search was to seize two cardboard boxes of Petitioner's property, and was improperly left to the discretion of an officer executing a warrant, contrary to Marron v. United States, 275 U.S. 192 (1927). Respondent Smith did not create or file returns or inventories in the May 3 search. A handwritten inventory created during the course of the litigation upon returning the materials to Petitioner, fifteen months later, shows the clearly non-culpable items which were seized and detained:

> 1 Diaper w/I Love You Mom
>
> . . .
>
> 2 Notice of Hearing 9-22-86 From Attor Bryan Hunt + 10-15-96
>
> . . .

1 1986 Fall NM Highlands University Schedule[10]

Aplt. App. 177.

1 Hair Holder

. . .

1 1982 Moviegoer Magizine [sic]

. . .

11 pages of Tree notes (school)

. . .

11 pages of Earth Science Tests -- Dolores;[11]

Aplt. App. 178.

From the second box referred to as "WHT-Cardboard - cardboard Castrol GTX":

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[10] These were seized in 1996, indicating that they rummaged not only through documents, but through papers in storage. The diaper was from Appellant Lisa Sanchez's infancy. She was 13 at the time of the searches.

[11] Dolores was Appellant's deceased daughter.

1 Yellow notebook with hypnosis and school related writings on financial aid

. . .

1 Receipt Santa Fe Mazda, 3,718.79
1 K-Bob's Receipt 10108
1 Envelope a/Letter from Dr. Garza on Hispanic Association of Colleges + Univ.

Aplt. App. 180.

1 Scudder Tax Planning Brochure
1 Folder on title of property located at 907 Tilden with 19 pages [Sanchez rental property]

. . .

1 1994 1040 Tax Booklet

Aplt. App. 181.

2 Citibank Visa Statement, 11/9/95, 11/20/95

. . .

5 Personal Bank Ch's 143, 147, 144, 146, 148

. . .

1 File Folder w/letter Judge Harris, Luis Juarez [previous district attorney], Abigail Aragon [ADA] on treatment of offenders

Aplt. App. 182.

The computer and printer that was seized on May 3rd were not tested until December. When tested by "mirror image technology," personal notes and children's school work were all that were found. Aplt. App. 159-164. The computer was returned during day two of Lt. Smith's deposition in March of 1997. Contrary to the Court of Appeals assumption, the seizures were not within the scope of the warrants. Coolidge, supra.[12]

ARGUMENT 6

THE COURT OF APPEALS OMITTED MENTION OF LT. SMITH'S MISREPRESENTATION

The Court of Appeals reviewed Lt. Smith's affidavits and found a substantial basis for the determination of probable cause. App. A at 6a. The Court did not address Petitioner's claim that Lt. Smith's affidavit contained material misrepresentation.

The only connection to Petitioner's home, after the seizure of the tape recorder on April 29th was Lt. Smith's false allegation concerning the quality of the print on the inflammatory flyer:

> I spoke with Max Baca, who is the computer expert employed with new Mexico

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[12] By contrast, the Tenth Circuit has held that a police search leaving of cigar and ashes in the resident's bedding, violated his Fourth Amendment rights. Lawmaster v. Ward, 125 F.3d 1341 (10th Cir. 1997).

> Highlands University. He has explained and demonstrated differences in copy and clarity. **Based on the information he provided**, I identified the copy of "El Nuevo Mejicano" as a much superior copy to those which have been circulated. The quality of the print was also bolder and clearer than those which have been identified previously. **The printer has been identified as a Canon color jet printer which has been seen in the home of Dorothy Sanchez**.

Aplt. App. 285.

Max Baca, the computer expert mentioned in the warrant, denies having told Smith that the print of the copy he showed Baca came from a Canon Color Jet printer in the home of Dorothy Sanchez. In fact, it was impossible to have come from any Canon Color Jet printer because it was printed on a laser printer. Aplt. App. 146:

> Q. Did you tell Gary Smith that the printer of the El Nuevo Mexicano had been identified as a Canon copy jet printer?
>
> A. No.
>
> . . .
>
> Q. Did you tell Gary Smith that a Canon Color jet printer had been seen in the home of Dorothy Sanchez?
>
> A. I've never visited Dorothy Sanchez' house, so I have no idea what's in her house or what equipment.

Aplt. App. 146. Baca also estimated that the town of Las Vegas contains about 600 of such printers. Id. It is a violation of the Fourth Amendment for an arrest warrant affiant to knowingly, or with reckless disregard for the truth, include false statements in the affidavit. Franks v. Delaware, 438 U.S. 154 (1978); Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990); Wolford v. Lasater, 78 F.3d 484 (10th Cir. 1996). See also, Salmon v. Schwarz, 94 F.3d 1131 (10th Cir. 1994).

ARGUMENT 7

WITHOUT THE FALSE STATEMENT CONNECTING PETITIONER'S HOME PRINTER WITH THE FLYER ON CAMPUS, NEITHER OF THE MAY 3RD WARRANTS STATED PROBABLE CAUSE TO EXPAND THE SEARCHES FROM UNIVERSITY TO PETITIONER'S HOME.

A review of the two warrants from May 3rd (Aplt. App. 281-286) show the warrants to be devoid of the required nexus of alleged criminal activity with the place to be searched. Marron v. United States, 275 U.S. 192 (1927). The first warrant contains the charge:

> In the city our county designated above there is now being concealed: Computers, and their contents and memory, Typewriters, Documents, Printers, any other items used to make, alter, manufacture, delete, and/or change documents.

Aplt. App. 281. The remainder of the warrant, by paragraph, shows:

1. That the affiant is a police officer;
2. That four days before he had seized NMHU property from Petitioner's home;[13]
3. Discovery of Petitioner's son's university diploma with "white out;"
4. An erased W-2 form;
5. Verification of Petitioner's son's graduation;[14]
6. Allegation from "several witnesses," alleging alteration of documents;
7. That Petitioner acknowledged taking the school equipment -- of the 4/29 search -- to her home.

While alteration of documents, if not diplomas, would appear to be a criminal offense, it clearly took place at Petitioner's office. Petitioner's admission that she took the tape recorder and mixer home has no bearing on the expansion of a document search through her home. Moreover the forensic necessity of seizing computers and printers at home to investigate alleged crimes involving erasure or false entry into documents at the office, makes no sense. It was plain that Lt. Smith was looking for evidence of the creation of the flyer.

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[13] As noted supra, there had been no reason to issue the first warrant instead of merely discussing the equipment with Petitioner during business hours.

[14] The "grossly incorrect" date was exactly 100 years earlier -- apparently as a joke.

The second warrant of May 3rd starts in the same way and seeks:

> In the city or county designated above there is now being concealed: flyers, documents, papers, all information utilized and entered into the New Mexico Highlands University computer system by Dorothy Sanchez and support staff members.

Aplt. App. 284. That description contains no connection to Petitioner's home. The next paragraph states that:

1. Lt. Smith was a police officer;
2. States that he found copies of "suspected hate mail,"[15]

The next paragraph is the false assertion that Max Baca had identified the printer as being at Petitioner's home.

The last paragraph notes that "numerous copies of El Grito," which Lt. Smith erroneously identified as a "hate letter." Again, there is no connection to Petitioner's home.[16]

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[15] He admitted later that he found two copies.

[16] The Record is devoid of any assertion of any other document than the original Nuevo Mexicano, inflammatory circular. The assertion that El Grito was a hate document is probative of the objective unreasonability of Lt. Smith's actions. Samples of El Grito are found at Aplt. App. 757, which speak, in non-flammatory language, of requiring a national search to find the best choice for a university president.

In sum, there was no justification on the fact of the warrant and affidavit to extend the search of alleged false University documents to Petitioner's home.

ARGUMENT 8

THE MAY 3, 1996 WARRANTS WERE NOT SUFFICIENTLY SPECIFIC

The warrants themselves were over broad. Respondent Smith testified that he could not tell from which of the two warrants he executed on May 3rd, the printer attached to Petitioner's computer, came under.

> Q. But the second thing, look at this affidavit, and you tell us which investigation you picked up the printer for?
>
> A. I would have to look at my notes, it's too confusing for me.
>
> Q. You can't tell just from reading the affidavits?
>
> A. No.

Aplt. App. 232.

A warrant must describe what may or may not be seized. Lo-Ji, supra, 442 U.S. at 325.

ARGUMENT 9

A GENUINE ISSUE OF FIRST AMENDMENT RETALIATION EXISTS.

The Court of Appeals asserted that Petitioner had not identified public speech which contributed to her First Amendment Claim. App. A at 7a. As an indication that the Court may not have had a full opportunity to review all of the facts and Petitioners' briefs, Petitioner did in fact specifically mention a speech to a community group called the Hispanic Round Table, the preceding month, at which she voiced criticism of the Administration of Highlands University, Aplt. App. 754. Mr. Pena, the Chairman, at the next meeting invited Respondents Rael and Garza to travel to Albuquerque to respond and personally requested that they not retaliate against Petitioner. Aplt. App. 755. It appears that a genuine issue of material fact on the First Amendment claim is raised. Petitioner also identified Respondent Lt. Smith's notes from his initial meeting with Respondent President Rael who allegedly stated: ". . . President Rael stated that Dr. Trujillo has led the movement against his administration. That a faction of students under Dr. Trujillo demonstratre and are very outspoken . . . he also mentioned that a Martin Suazo was alleged to have been giving out the El Grito[17] [sic] and

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[17] As noted elsewhere, the El Grito was not the inflammatory flyer for which he was called to investigate. It criticized the Rael adminsitration, inter alia: "The regents and Rael adminsitration continue to dismiss the validity of student and community concerns regarding the conditions of University classrooms . . . questionable use of public funds by university officials. . . ." Aplt. App. 757, 759.

was making phone calls to Dorothy Sanchez and Dr. Trujillo. . . ." Aplt. App. 79.

In addition a fact finder could infer a retaliatory motivation on the part of Respondent Rael and the other administrators: despite a faultless, 24 year career, no confrontation with Petitioner was had prior to the after hours meeting, and search, and report from the state police. As police expert VanBlaricom stated, her treatment was similar to that of an organized crime figure. Aplt. App. 168.

ARGUMENT 10

THE COURT OF APPEALS APPEARS TO HAVE RELIED ON INADMISSIBLE MATTERS TO SUPPORT THE SUMMARY JUDGMENT

Summary judgment must be based upon material which would be admissible. F.R.C.P. Rule 56. Celotex, supra. The Court of Appeals' referred to Petitioner being "still under investigation," and suspected of creating false financial aid records. The claim that Petitioner was still under investigation is a claim that is normally impossible to disprove. The police do not generally announce when a person is no longer under investigation. The undersigned counsel represents, however, that despite Respondent Smith's vigorous attempts to find an agency to prosecute Petitioner for real or imagined offenses, Petitioner cooperated by an interview with an investigator from the U.S. Attorney's office. No charges were filed. Neither did Respondents produce any evidence in this case reflective of criminal activity on Petitioner's part. As noted supra, pg. 9, the Court of Appeals assumed the truth of the allegation of W-2 alteration. Petitioner has never been heard to defend on that

claim, but more importantly, the alleged documents were never produced. Lt. Smith did not even make an inventory of the materials he gave federal investigators. Aplt. App. 141. In sum, the assertions of criminal behavior by Respondents against Petitioner are not supported by the Record and are inappropriate for summary judgment. More importantly, Petitioner cannot possible defend herself against the Court of Appeals' conclusion since Lt. Smith and the University never made charges against her.

ARGUMENT 11

THE COURT OF APPEALS OMITTED REFERENCE TO PETITIONER'S PROPERTY INTEREST UNDER FEDERAL LAW.

The Court of Appeals held that Petitioner had failed to show a property interest in her yearly contracts with New Mexico Highlands University. The Court did not discuss the affidavit of the previous president that there was a de facto requirement of good cause, Aplt. App. 631, 627, nor did they discuss the testimony of the federal administrator that good cause and federal approval were required to terminate Petitioner from her position. Aplt. App. 85, 118. A sufficient fact issue was raised. Perry v. Sinderman, supra.[18]

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[18] Assuming no property interest, Petitioner still had a claim for First Amendment retaliation. Rankin v. McPherson, 483 U.S. 378 (1987).

CONCLUSION

Petitioners request that this Court grant the Writ and reverse to allow Petitioners a forum in which to vindicate the several substantial constitutional claims raised during the two weeks of office and home searches, and subsequent retention by the New Mexico State Police, which have been misapprehended by the Courts below.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed June 9, 1999]

No. 98-2159
(D.C. No. CIV 96-934)
(D. N.M.)

DOROTHY SANCHEZ, individually and as next friend of Lisa Sanchez,
Plaintiff-Appellant,

v.

GILBERT BACA, Captain; NEW MEXICO DEPARTMENT OF PUBLIC SAFETY; SELMINO RAEL, President, New Mexico Highlands University; MARGARET GARZA, DR.; GARY SMITH, Lieutenant; WILTON ROGERS; NEW MEXICO HIGHLANDS UNIVERSITY,
Defendants-Appellees.

ORDER AND JUDGMENT*

Before TACHA, BARRETT, and MURPHY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Dorothy Sanchez, individually and as next friend of her daughter Lisa Sanchez, appeals from the order of the district court granting defendants' motions for summary judgment and denying her motion for summary judgment against defendant Gary Smith. We affirm.

Sanchez had been the director of student support services at New Mexico Highlands University (NMHU) for twenty-four years. She administered a program designed to assist first generation college students who were predominantly Hispanic. She was employed on a year to year contract.

In April 1996, a racially inflammatory flyer, "El Nuevo Mexicano," was circulated on campus. The New Mexico State Police, in conjunction with the New Mexico Department of Public Safety (collectively "NMDPS

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

defendants"), began an investigation at the request of NMHU officials because the flyer threatened death and violence against certain faculty and administrative personnel.

In the course of this investigation, the police learned that Sanchez might be using NMHU equipment in her home, which was against NMHU policy. The police obtained three search warrants which resulted in one search of Sanchez' office and two searches of her home. Some equipment was found in her home. Falsified federal financial aid records and other official NMHU documents were found in her office as well as multiple copies of the hate flyer. According to defendants, this matter remains under investigation by both state and federal law enforcement officials. After the equipment was found in her home, the NMHU defendants placed Sanchez on suspension with pay and later gave her notice that her contract would not be renewed for the 1996-97 school year.

Sanchez then commenced this action in which she raised twenty-two claims, apparently under 42 U.S.C. § 1983, Title VII, and various state laws. She raised Fourth Amendment illegal search and seizure claims against the NMDPS defendants. She alleged the NMHU defendants violated her rights by suspending her with pay and by later not renewing her contract without proper due process procedures. She also alleged her liberty and First Amendment rights were violated. Sanchez raised claims on behalf of her daughter against the NMDPS defendants alleging Fourth Amendment search and seizure violations during the first search, when her daughter was home.

The district court dismissed Sanchez' claims brought against the NMDPS defendants pursuant to the Fifth Amendment and her claims for abuse of process and malicious prosecution. Sanchez does not appeal this order. The court also granted all defendants' motions for summary judgment and denied her motion for summary judgment against defendant Lt. Gary Smith.

On appeal, Sanchez argues that her motion for summary judgment should have been granted. She also contends her Fourth Amendment rights were violated by the searches as defendants had no probable cause for any of the searches, the searches were pretexual, and the first warrant was unreasonable. She states that the NMHU defendants conspired with the NMDPS defendants, violated her Fourth Amendment rights by searching her office, and violated her property right in continued employment, her First Amendment rights of free speech and association, and her liberty interests.

"We review the entry of summary judgment de novo, drawing all reasonable inferences in favor of the nonmovants." Hulsey v. Kmart, Inc., 43 F.3d 555,557 (10th Cir. 1994). The moving party must show there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. See id. The nonmovant must establish, at a minimum, an inference of the presence of each element essential to the case. See id.

Sanchez asserts the NMDPS defendants violated the Fourth Amendment in searching her home twice and her office once. The first search of her home appears to have been the result of Lt. Smith's conversation with several people

about the threatening flyer, which first brought police presence to the campus at the administration's request. While speaking with Sanchez' secretary, Lt. Smith learned that Sanchez had taken some state property, including a computer, recorder, and associated items home and that she was performing hypnotherapy at her home as she had been told not to do it on campus. Lt. Smith verified that Sanchez did not have permission to take the equipment home. University officials then went to Sanchez' office, without police presence, to see if the equipment was there. It was not. Some NMHU equipment was found in Sanchez' home as a result of the search and she was suspended with pay.

The second search warrant was issued for Sanchez' office. Lt. Smith had learned through interviews with various individuals, including Sanchez' secretary, that Sanchez had been altering documents, including W-2-forms and tax returns, apparently to qualify first generation students for scholarships when their family income was too high. The search warrant was issued to find those altered documents.

During the execution of the second search warrant, a large number of copies of the hate flyer was discovered and Lt. Smith sought another search warrant for Sanchez' home to look for threatening letters. Lt. Smith also had information that Sanchez may have been involved in distributing the flyer as 500 copies were unaccounted for on her copy card and students had been seen using that card to copy the flyer.

We review the sufficiency of the affidavit upon which a warrant is issued by looking at the totality of the circumstances and simply ensuring "that the magistrate had a substantial basis for concluding that probable cause existed."

Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (quotation omitted). Probable cause means, that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id. at 238.

We have reviewed the supporting affidavits contained in the appendix and conclude that each affidavit provided the magistrate with a substantial basis for concluding probable cause existed to justify the issuance of the warrants. Further, Sanchez has failed to show that the searches exceeded the warrants.

Sanchez has two main claims against the NMHU defendants. One is based on her suspension with pay and non-renewal of her employment contract. "Suspension with pay does not raise due process concerns." See Hicks v. City of Watonga, 942 F.2d 737, 746 n.4 (10th Cir. 1991) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 544-45 (1985); Pitts v. Board of Educ. of U.S.D. 305,869 F.2d 555, 556 (10th Cir. 1989)). No due process or liberty interests violations occurred due to Sanchez' suspension with pay.

Sanchez was employed pursuant to a year-to-year contract. That contract was not renewed. Sanchez has failed to show that she had a constitutionally protected property interest in her continued employment. "[A] nontenured school district employee 'must have more than a unilateral expectation [of continued employment]. He must, instead, have a legitimate claim of entitlement to it.'" Sullivan v. School Bd. of Pinellas County, 773 F.2d 1182,1185 (11th Cir. 1985) (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)). In Sullivan, the court concluded that a teacher with a long employment history with

the school may, under certain circumstances, have a legitimate claim to job tenure under certain circumstances.

Sanchez has not shown any such expectation. She therefore had no protected property interest in her continued employment, nor has she shown any mutually explicit understanding sufficient to create such an interest.

Secondly, Sanchez alleged that the NMHU defendants violated her liberty and First Amendment rights because her suspension was in retaliation for her speech on matters of public interest. Sanchez did not identify the incidents to which she was referring, but apparently some occurred after she filed the lawsuit and were added to her amended complaint. These comments cannot support a claim of retaliation occurring before the comments were made.

Sanchez' other allegations are vague. She stated that she was not offered the opportunity to clear her name prior to her suspension and that she was suspended "in retaliation for her association and speech on matters of public interest concerning University administration." App., Vol. 1 at 18. Later, she mentions flyers that were critical of the NMHU president and suspicions that she may have been involved with them. None of these conclusory accusations is sufficient to state a viable claim.

The remainder of Sanchez' claims arise out of these three main issues. She raised claims of trespass, conversion, a property right in the computer equipment as her personal items were on it, and Fourth Amendment violations on behalf of her daughter who was at home asleep during the first search. She has not stated any viable claim.

We have reviewed the parties' briefs, the appendices, and the district court's oral explanation of its judgment and its opinion. We conclude that the district court properly granted defendants' motion for summary judgment and denied Sanchez' motion for summary judgment. The judgment of the United States District Court for the District of New Mexico is AFFIRMED.

Entered for the Court

/s/_____
James E. Barrett
Senior Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

[Filed May 8, 1998]

No. CIV 96-0934 LH/WWD

DOROTHY SANCHEZ, individually and as Next Friend of LISA SANCHEZ, a Minor,
Plaintiffs,

v.

LIEUTENANT GARY SMITH; CAPTAIN GILBERT BACA; AGENT ROBERT SANROMAN; SERGEANT RODRIGO LEAL; OFFICER TOBY DOLAN; NEW MEXICO PUBIC SAFETY DEPARTMENT; SELIMO RAEL, PRESIDENT, NEW MEXICO HIGHLANDS UNIVERSITY; DR. MARGARET GARZA, WILTON ROGERS; and NEW MEXICO HIGHLANDS UNIVERSITY,
Defendants,

ORDER GRANTING SUMMARY JUDGMENT

This matter comes before the Court on Defendants New Mexico Highlands University and Selimo Rael, President, Margaret Garza and Wilton Rogers' Motion for Summary Judgment and Qualified Immunity, filed March 30, 1998 (Docket No. 203); Second Motion by Defendants Gary Smith, NM Public Safety and Gilbert Baca to Dismiss or in the Alternative for Summary Judgment filed March 30, 1998 (Docket No. 197); Plaintiff's Motion for Summary Judgment Against NMHU Defendants, filed March 30, 1997 (Docket No. 177); and Plaintiff's Motion for Summary Judgment against Defendant Lt. Smith, filed March 30, 1998 (Docket No. 184). The Court, having considered the pleadings submitted by the parties, the arguments of counsel, and otherwise being fully advised, finds for the reasons set forth below and on the record in open court at the hearing held on April 23, 1998, that the motion for summary judgment filed by Defendants New Mexico Highlands University and Selimo Rael, President, Margaret Garza and Wilton Rogers and the second motion by Defendants Gary Smith, NM Public Safety and Gilbert Baca to dismiss or in the alternative for summary judgment are well taken and will be granted and that the pending motions *in limine*, motion to quash subpoena and motion to strike exhibits are moot and will be denied as such,

1. The first, second and third causes of action for trespass and conversion as set forth in the Plaintiffs' Amended Complaint for Damages, Declaratory and Injunctive Relief are dismissed for the reason that there exists no waiver of immunity pursuant to the New Mexico Tort Claims Act for the torts of trespass and conversion committed by law enforcement officers acting within the scope of their duties.

2. Summary judgment is granted dismissing the fourth, fifth, tenth, and eleventh causes of action because the undisputed material facts establish that Lt. Smith had probable cause to justify each of the warrants and that each of the warrants was lawfully issued on probable cause and that they were lawfully executed. In addition, it is the finding of the court that an objectively reasonable police officer would have taken the same, or would be expected to have take the same, actions as the Defendant police officers and the Defendants are therefore entitled to qualified immunity.

3. As to the sixth cause of action, the allegations fail to state a claim upon which relief can be granted and the Defendant New Mexico Public Safety Department's motion to dismiss as to this cause of action will be granted. The court has concluded that there was probable cause for all searches and that lawful seizures ensued. Therefore any failure to return search warrants and to inventory items timely, if that occurred, does not state a constitutional violation and alleges only ministerial matters for which no claim can be made.

4. With respect to the seventh, eighth and ninth causes of action, the Plaintiff has not overcome the burden imposed upon her by the Defendants' assertion of qualified immunity in that she has failed to demonstrate that the law was clearly established that employers are not permitted to look through an employee's office and turn over the personal papers of an employee on suspension which they believe may be relevant to any ongoing criminal investigation.

The plaintiff may not assert a Fourth Amendment claim or a conversion claim regarding the documents in

question in that the record does not establish that the documents belong to her.

5. The twelfth cause of action for violation of state law is dismissed for failure to state a claim.

6 The thirteenth cause of action for conspiracy is dismissed based upon the undisputed material facts which establish that there is no evidence that the Defendants wrongfully focused any investigation on the Plaintiff or that they conspired to otherwise deprive the Plaintiff of any civil rights.

7. The Court grants the Defendant's motions for summary judgement on the claims of Plaintiff Lisa Sanchez based upon the Court's finding that the State Police Defendants are entitled to qualified immunity for the Plaintiff's trespass claims and because any material documents acquired during any of the searches were owned solely by the Plaintiff or by other individuals.

8. The Defendants' motion for summary judgment is granted as to the Plaintiff's claim for procedural due process contained in the fourteenth cause of action because the law is clear in the Tenth Circuit that a suspension with pay pending, the outcome of a criminal investigation, does not implicate any property rights and therefore the Plaintiff was not deprived of any due process.

9. The Defendants' motion for summary judgment is granted as to the fifteenth cause of action which alleges a violation of the Plaintiff's liberty interests. The Plaintiff has based this claim on comments which were made after this

lawsuit was filed and, as such, those statements cannot provide the basis for the claim asserted in her lawsuit.

10. The Defendants' motion for summary judgment is granted as to the Plaintiff's sixteenth cause of action wherein the Plaintiff claims she was retaliated against in violation of the First Amendment. The undisputed, material facts establish that no causal connection exists between any statements she may have made or any association she may have made and the Plaintiff's suspension and the non-renewal of her contract.

11. The Defendant's motion for summary judgment is granted as to the Plaintiff's seventeenth cause of action for deprivation of procedural due process based upon the non-renewal or her contract. The Plaintiff has failed to raise a material, factual issue to refute the undisputed material facts that her employment contract expired by its own terms, that she was not terminated and that accordingly the Plaintiff had no property interest in employment beyond the terms of the contract. In addition, Section 37-1-23 (A) NMSA 1978 (1990 Repl.) provides immunity from suit for contract claims against governmental entities unless such claims are based upon a valid written contract. The Plaintiff has failed to provide evidence of any written contract to renew her employment.

12. The Plaintiff's eighteenth, nineteenth, twentieth, and twenty-first claims are barred by the New Mexico Tort Claims Act because the causes of action are for tortious acts for which the state has not waived immunity.

13. The Defendants' motion for summary judgment is granted as to the Plaintiff's twenty-second cause of action

for breach of contract based upon the statutory requirement in New Mexico contained in Section 37-1-23 (A) NMSA 1978 (1990 Repl.) which provides that any contract claim against the state must be in writing. The Plaintiff has failed to provide any evidence of a writing establishing her claim that her contract was breached.

IT IS, THEREFORE, ORDERED that Defendants New Mexico Highlands University and Selimo Rael, President, Margaret Garza and Wilton Rogers' Motion for Summary Judgment and Qualified Immunity, filed March 30, 1998 (Docket no. 203) is granted.

IT IS FURTHER ORDERED that the Second Motion by Defendants Gary Smith, NM Public Safety Department and Gilbert Baca to Dismiss or in the Alternative for Summary Judgment filed March 30, 1998 (Docket no. 197) is granted.

IT IS FURTHER ORDERED that the Plaintiff's Motion for Summary Judgment against NMHU Defendants, filed March 30, 1997 (Docket no. 177); and Plaintiff's Motion for Summary Judgment against Defendant Lt. Smith, filed March 30, 1998 (Docket no. 184), are denied.

IT IS FURTHER ORDERED that all pending motions *in limine,* the pending Government's Motion to Quash Subpoena, filed April 13, 1998 (Docket No. 236) and the Plaintiff's Objection to Defendants New Mexico Highlands University's Supplemental Exhibit List and Motion to Strike filed April 20, 1998 (Docket No. 240), are all denied as moot.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed May 7, 1998]

No. CIV 96-0934 LH/WWD

DOROTHY SANCHEZ, individually and as Next Friend of LISA SANCHEZ, a Minor,
Plaintiffs,

v.

LIEUTENANT GARY SMITH; CAPTAIN GILBERT BACA; AGENT ROBERT SANROMAN; SERGEANT RODRIGO LEAL; OFFICER TOBY DOLAN; NEW MEXICO PUBIC SAFETY DEPARTMENT; SELIMO RAEL, PRESIDENT, NEW MEXICO HIGHLANDS UNIVERSITY; DR. MARGARET GARZA, WILTON ROGERS; and NEW MEXICO HIGHLANDS UNIVERSITY,
Defendants,

FINAL JUDGMENT

THIS MATTER came before the Honorable C. LeRoy Hanson, United Slates District Judge, on April 23, 1998, for a hearing on Defendants New Mexico Highlands University and Selimo Rael, President, Margaret Garza and Wilton Rogers' Motion for Summary Judgment and Qualified Immunity, filed March 30, 1998 (Docket No. 203); Second Motion by Defendants Gary Smith, NM Public Safety Department and Gilbert Baca to Dismiss or in the Alternative for Summary Judgment filed March 30, 1998 (Docket No. 197); Plaintiff's Motion for Summary Judgment against NMHU defendants, filed March 30, 1997 (Docket No. 177); and Plaintiff's Motion for Summary Judgment against Defendant Lt. Smith, filed March 30, 1998 (Docket No. 184). The Court, having considered the pleadings submitted by the parties, the arguments of counsel, and otherwise being fully advised, found in its Order Granting Summary Judgment, filed contemporaneously with this Final Judgment, that the motion for summary judgment filed by Defendants New Mexico Highlands University and Selimo Rael, President, Margaret Garza and Wilton Rogers and the motion to dismiss or in the alternative for summary judgment filed by Defendants Gary Smith, NM Public Safety Department and Gilbert Baca were well taken and granted summary judgment in favor of all Defendants, dismissing all of the Plaintiffs' claims, and found that the motions *in limine,* the motion to quash and the motion to strike were moot. This Final Judgment adjudicates all existing claims and liabilities of the parties and therefore, this case is dismissed with prejudice.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed July 23, 1999]

No. 98-2159

DOROTHY SANCHEZ, individually and as next friend of Lisa Sanchez, *Plaintiff-Appellant*,	)
v.	)
FRANK E. SMITH, Major; ROBERT SANROMAN, Agent; RODRIGO LEAL, Sergeant; TONY DOLAN, Officer; LUIS JUAREZ, District Attorney for the Fourth Judicial District; ABIGAIL ARAGON, Assistant District Attorney for the Fourth Judicial District; ESTHER GARDUNO, Assistant District Attorney for the Fourth Judicial District; PAUL SKOTCHDOPOLE, Major; JOHN TRUJILLO; LONNIE MONTOYA; CITY OF LAS VEGAS; CITY OF LAS	)

VEGAS POLICE DEPARTMENT;)
JOHN DOES, I-IX, individually)
and in their official capacities,)
Defendants,)
)
and)
)
GILBERT BACA, Captain;)
NEW MEXICO DEPARTMENT)
OF PUBLIC SAFETY;)
SELMINO RAEL, President,)
New Mexico Highlands University;)
MARGARET GARZA, DR.;)
GARY SMITH, Lieutenant;)
WILTON ROGERS; NEW)
MEXICO HIGHLANDS)
UNIVERSITY,)
Defendants-Appellees.)
)

ORDER

Before TACHA, BARRETT, and MURPHY, Circuit Judges.

Appellant Dorothy Sanchez, individually and as next friend of Lisa Sanchez, has filed a petition for rehearing with suggestion for rehearing en banc.

The materials submitted by appellant have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, the petition is denied on the merits.

Appellant notes that this court failed to rule on her motion to file separate reply briefs. As both briefs were reviewed by the panel prior to issuing its decision, the motion is hereby, granted, although separate reply briefs are discouraged and are not provided for under the rules.

The petition having been denied on the merits by the panel to which the case was submitted, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service in accordance with Rule 35(b) of the Federal Rules of Appellate Procedure. No member of the hearing panel and no judge in regular active service on the court having requested that the court ve polled on rehearing en banc, the suggestion for rehearing en banc is denied.

Entered for the Court
PATRICK FISHER, Clerk

/s/_____
By: Deputy Clerk

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed June 23, 1999]

No. 98-2159

DR. DOROTHY SANCHEZ, Individually and as next friend of LISA SANCHEZ,
Appellants,

v.

LIEUTENANT GARY SMITH, CAPTAIN GILBERT BACA, NEW MEXICO DEPARTMENT OF PUBLIC SAFETY; SELIMO RAEL, PRESIDENT OF NEW MEXICO HIGHLANDS UNIVERSITY, DR. MARGARET GARZA, WILTON ROGERS, NEW MEXICO HIGHLANDS UNIVERSITY, Individually and in Their Official Capacities,
Appellees.

On Appeal from the United States District Court for the District of New Mexico

The Honorable C. LeRoy Hansen
District Judge

D.C. No. Civ. 96-934

APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Pursuant to Rules 35 and 40 of this Court, Appellants respectfully request rehearing of the Order and Judgment of June 9, 1999 (hereinafter referred to as Order). The grounds for this Motion are:

1. The Order's factual summary includes findings which are either incorrect, or in controversy, and shows a serious misapprehension of the total factual situation.

2. The Panel misperceived the result of the searches. Rather than there being large numbers of the offending flyer and evidence of other wrongdoing seized, the Record reflects that the multiple searches and seizures were wholly unable to connect Appellant to any wrongdoing. Specifically, the Record shows:

A. No large numbers of the flyer were found in the searches, but only two;

B. The alleged 500 copies reported by disgruntled employees identified other persons, not Appellant. The copies allegedly made were of the political flyer El Grito, not the racist flyer. Aplt. App. 404.

C. The alleged falsified documents were never produced in this Record and are not before the Court; the description of said documents is wholly based on Appellee Smith's perception and description.

D. Appellee Smith combined the legitimate political flyers on campus with the one offending flyer in his description of "hate letters."

E. Appellant has proof positive that Smith was overreaching: he misrepresented the printer to justify a search of her home and his attempts to interest other prosecuting agencies were unsuccessful.

In sum, none of the material described in the warrant affidavits or seized in the multiple searches were ever used in any proceedings or showed a connection to the offending flyer. Smith investigations resulted in no prosecution of anyone.[1] Appellant Sanchez should be permitted to show, as her police expert maintained, that Smith's actions were below an objectively reasonable standard. The Panel, respectfully, misperceived the complete lack of substance to Smith's claims and the degree to which they were based on his credibility alone. Appellant Sanchez should have an opportunity to show that she was an innocent, long term administrator, caught between campus political rivalry and an overzealous policeman.

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[1] A federal grand jury subpoenaed records from Sanchez's former office in July of 1996. Aplt. App. 580. No prosecutions issued.

A more clear apprehension of the facts would send the case back for trial to allow inference of police and university misconduct to be considered by a jury. McKenzie v. Renber's Inc., 94 F.3d 1478, 1483 (10th Cir. 1996).

3. The Order also omits significant legal issues raised in Appellants' Brief in Chief and Reply Briefs, as discussed below.

I.

THE COURT ORDER ERRONEOUSLY CLAIMS THAT CLAIMS WERE BROUGHT UNDER TITLE VII

The Court Order erroneously states that some claims were brought under Title VII. This is not the case. See Amended Complaint, Aplt. App. 1. If the Panel perceived a Title VII claim arising from home and office searches and retaliatory discharge, in the context of a campus political controversy, the Panel may have developed an unreasonably adverse perception of the merits of the case.

II.

THE ORDER DOES NOT INDICATE THAT APPELLANTS' REPLY BRIEFS WERE BEFORE THE COURT

Appellants sought to timely file two reply briefs in response to the two separate briefs filed by the police and university Appellees. On December 9, 1998, this Court ordered that Appellants' Motion to Allow Separate Filing of

Reply Briefs would referred to the Panel assigned to dispose of the case on the merits. The Reply Briefs cover some issues of which the Panel may not have been aware. An example is the Court's statement that Sanchez did not identify her protected speech (Order, Pg. 7, Lns. 18-19). Appellants did identify such speech; that she appeared at and spoke to a meeting of the community group Hispanic Round Table, the month before her termination; and spoke at a public forum; and that Appellee Rael was told of her appearance and presentation. See Appellants' Reply Brief to NMHU Answer Brief, pg. 7, citing Aplt. App. 643, 754; also, 560 and 561.

The Court may not have had a full opportunity to review the Reply Briefs which discuss in greater detail the facts, which the Panel took as uncontroverted.

Appellants request that the Reply Briefs be filed and considered if they were no so previously. Should Rule 31.4 of this Court operate to preclude a separate reply to both of the governmental Appellee's responses, a serious due process and equal protection issue would arise. This is particularly true in such a case of multiple, factual, and legal issues which could not, as a practical matter be addressed on one reply brief.[2]

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[2] Indeed, the number of fact and law issues raised which generated some 30 depositions make difficult the encapsulation of such issues in two briefs, and emphasized the difficulty of summary judgment practice on such a factual record. Finley v. United States, 82 F.3d 906 (10th Cir. 1996).

III.

THE ORDER OMITS THE CLAIM OF IMPROPER RETENTION

This Circuit has held that unreasonable detention, even if justified at the inception can violate the Fourth Amendment. Davis v. Gracey 111 F.3d 1472 (10th Cir. 1997); In re Search of Kitty's East, 905 F.2d 1367, 1375 (10th Cir. 1990). Pg. 7 of Reply Brief; pg 14 of Appellant's Brief in Chief. See, City of West Covina v. Perkins, 66 U.S.L.W. 4058 (1999).

The Order omits any mention of the fact that the police seized Sanchez personal home computer and personal papers on May 3, 1996. The computer was not sent for analysis until December of 1996, and not returned until Smith's deposition in the instant action until March of 1997. The Albuquerque Police Department, who read the hard drive, found only innocent family material, including Appellant Lisa Sanchez's school work. Aplt. App. 164, 165. There is nothing in the computer or in the papers that was used by any law enforcement agency. Appellee Smith did not file a return relating to the seizure as required by state law. Regardless of the merit of any original search, Smith's retention of the computer and personal papers was unreasonable. The Order does not refer to such post search conduct.

IV.

THE ORDER OMITS MENTION OF THE CLAIM OF GENERAL SEARCH

A general search has been proscribed by this Circuit. See U.S. v. Medlin, 842 F.2d 1194, 1199 (10th Cir. 1988). On May 3, 1996, Appellee Smith executed two more searches of Appellant's home and two more searches of her office. See Warrants, Aplt. App. 281, 284.[3] Smith ordered the police officers under his direction to search the home and pick up "anything that looked financial." Aplt. App. 174. They could not tell whether any of the financial documents were forged or not. Id. The police created two cardboard boxes of documents, including credit card statements, trust funds, documents from Lisa Sanchez's settlement with a drunk driver who injured her, as well as her school work. Aplt. App. 177-184. There was never a connection made between anything seized from the home in the May 3rd searches and any alleged misconduct, but Smith retained the documents until August of 1998, 15 months later.[4]

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[3] Each of the two May 3rd warrants covered two locations: home and office.

[4] The Order notes that Sanchez "had been altering documents, and the search warrant was issued to find them." Order Pg. 5. The allegation was by a disgruntled secretary. The allegedly altered documents are not part of the Court record. No finding of Appellants' responsibility ever made, nor was she ever charged. The federal official responsible for monitoring her performance of the $400,000 grant gave a trial deposition in her favor. Aplt. App. 484. On this Record, such charges of "altering documents," are

The personal financial documents were not inventoried and no return was filed in court. Aplt. App. 175, 184. An unfiled inventory merely describes two card board boxes with miscellaneous paper work. Aplt. App. 458. Smith held the documents, original tax records, credit card statements and other personal matters for 15 months. He returned the boxes of personal documents to the Appellant during one of his deposition sessions in August of 1997. An inventory was prepared by Order of the District Court in August of 1997, consisting of four hand-written pages. Aplt. App. 177, 184.

Whether or not the warrants were based on probable cause and were narrowly tailored, the execution of the warrants and picking up anything that "looked financial," resulted in a general, exploratory rummaging of personal belongings, Coolidge v. New Hampshire, 403 U.S. 446 (1971); United States v. Leary, 846 F.2d 592 (10th Cir. 1988). In the breadth of the materials searched and seized, as well as, above, the improper length of time of detention. See Wilson v. Lane. 67 U.S.L.W. 4322, 4324 (1999) (the Fourth Amendment requires police actions in execution of the warrant to be related to the objective of the intrusion and strictly limits its permissible extent).

There was never any civil or administrative proceeding, or criminal prosecution instituted by any agency. They apparently stayed in the locker at the Las Vegas New Mexico State Police office for the entire 15 months.

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clearly susceptible of an over zealous policeman working with vindictive administrators. In fact, Smith testified that he tried to interest state and federal prosecutors with the allegedly altered documents. He was unsuccessful.

V.

THE PANEL MISPERCEIVES THE NATURE AND EXTENT OF THE FLYERS

A critical misperception of the Panel is the nature of the political controversy and the permissible police objective. New Mexico Highland's University was engaged in a robust political controversy concerning whether a national search for the position given to Appellee Rael should have been instituted. Aplt. App. 757. This generated the creation and distribution of leaflets and newsletters, generally critical of the choice of Selimo Rael and the actions of his administration. Similar leaflets had been going on for 20 years. Aplt. App. 314.

The police were called on campus for only one flyer: "El Nuevo Mexicano." The other flyers such as E1 Grito, E1 Machete, the Las Vegas Whisper were critical of the Rael administration and circulated on campus simultaneously with the hate letter E1 Nuevo Mexicano. Rael testified that he called the police only because of the threat to personal security, made in the Nuevo Mexicano flyer. Aplt. App. 555.

The evidence is clear and uncontroverted that Smith continually confused the legitimate subject of the investigation, i.e., the E1 Nuevo Mexicano threat matter with the other flyers which contained legitimate campus political commentary. See Appellants' Brief in Chief, Para. 21, and Aplt. App. 757-760:

> The regents and administration. . . continue to dismiss the validity of student and community

> concerns regarding conditions of the University classrooms, questionable use of public funds by University officials, the questionable social/cultural commitment of Mr. Rael to the people of Northern New Mexico and the alarming treatment by the Rael administration directed toward outspoken critics of his administration. . . ."

Aplt. App. 757. See also, Aplt. App. 759, E1 Grito of April 20, 1996, commenting on restraining order obtained by two student senators: "Why are minority educational/service organizations such as the Hispanic Round Table, GI Forum, Image of Albuquerque. . . becoming advocates for student rights at NMHU. . . ." Aplt. App. 360. Smith testified that he had "quite a few, perhaps 50 different flyers. . . .", one of which was "El Grito" which he remembered specifically by name. Aplt. App. 762. Smith's affidavit claims that he found numerous copies of E1 Grito-- not the El Nuevo Mexicano. Aplt. App. 285. He describes El Grito as a "another hate document." It is very plain that E1 Grito is a non-threatening political circular. Aplt. App. 757

Smith's statement that "numerous copies of "El Grito," another hate document. . . ." shows his lack of reasonability. The Panel may have misperceived the two. Aplt. App. 285.

VI.

THE PANEL MISPERCEIVES THE NUMBER OF COPIES ALLEGEDLY FOUND IN SANCHEZ'S OFFICE

The Record does not support the Panel's statement that a "during the execution of the second search warrant, a large number of copies of the hate flyer was discovered," in Sanchez's office, home or anywhere else (Order Pg. 5). This is a serious misapprehension. If it were true, the case would be on a different footing. In his sixth deposition, after Court ordered production of seized items, Smith was asked:

> Q. Did you seize any more than two copies from Dorothy Sanchez' office?
>
> A. No, only two of the El Nuevo Mexicano.
>
> Q. You're sure of that?
>
> A. As best as I can remember.

Smith Depo. Vol. VI, Pg. 15, Lns. 2 - 6 (attached as Exhibit "1"); see also Aplt. App. 234, listing in his inventory of the office search: 8 flyers, newsletters, and horoscopes." As noted, previously, Smith mistook the other political flyers as "hate letters." There is no basis in the Record to support a finding that Smith ever found a large number of flyers, and certainly no evidence connecting Appellant to them.

Because Smith never could find such evidence, he obtained successive warrants to broaden his searches. His

searches focussed not on large numbers of flyers, but sought to discover the source of the printing of the flyer, attempting to connect one of the two flyers at Appellant's office as a "superior," i.e., master copy. Aplt. App. 285. In his zeal, he falsely claimed in the affidavit that he had been told by the university computer expert that the better copy had been identified as being produced by a Canon Color Jet Printer which had been seen in the home of Dorothy Sanchez. Id.

VII.

THE ORDER OMITS REFERENCE TO THE FALSE WARRANT AFFIDAVIT

Contrary to the Panel's understanding, Smith's May 3rd searches of the Sanchez home were generated by his need to find a printer with which he could connect Sanchez to the manufacture or distribution of the flyer. Had he found a large number of the flyer, such additional evidence would have been unnecessary. He only uncovered two, and perceived the Sanchez copies to be superior.[5]

> I spoke with Max Baca, who is the computer expert employed with new Mexico Highlands University. He has explained and demonstrated differences in copy and clarity. **Based on the information he provided**, I identified the copy of "El Nuevo Mexicano" as a much superior copy to those which have been circulated. The quality of the print was also

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[5] The flyers were widely distributed on campus. Aplt. App. 439.

> bolder and clearer than those which have been identified previously. **The printer has been identified as a Canon color jet printer which has been seen in the home of Dorothy Sanchez.**

Appellants' Brief at Pg. 17; Aplt. App. 285.

> Q. Did you tell Gary Smith that the printer of the El Nuevo Mexicano had been identified as a Canon copy jet printer?
>
> A. No.
>
> . . .
>
> Q. Did you tell Gary Smith that a Canon Color jet printer had been seen in the home of Dorothy Sanchez?
>
> A. I've never visited Dorothy Sanchez' house, so I have no idea what's in her house or what equipment.

Aplt. App. 146. Use of a false or misleading affidavit violates the Fourth Amendment. Wolford v. Lasater, 78 F.3d 464 (10th Cir. 1996).

VIII.

TO ORDER MAKES NO REFERENCE TO APPELLANT'S EXPERT CLAIM OF LACK OF OBJECTIVELY REASONABLE POLICE TACTIC

The lack of any documentary connection of Sanchez to production of the flyer, Smith's misleading affidavit, and the lack of production of any other culpable documents, show the entire spate of searches to be dependent upon Smith's credibility. The Panel may have been unaware of this. See, Affidavit of Chief VanBlaircom, Aplt. App. 622, in which he points out inter alia, that Smith failed to interview Sanchez at any time, isolating her without reason; and that his actions showed him to be looking for a crime to fit the suspect, rather than vice versa. See Anthony v. Baker, 767 F.2d 657 (10th Cir. 1985) (police expert testimony on pretextual investigation). The confusion between El Nuevo Mexicano and the other flyers; as well as Smith's inability to interest any prosecutors in what he perceived to be suspicious documents, not in this Record, raise a triable inference of his unreasonable conduct.

The Record supports an inference that three searches of Appellant's home and three of her office in the space of one week were objectively unreasonable. The Court's acceptance of Smith's allegations as true constitutes a serious miscarriage of justice. The Appellants should have an opportunity to show that Lt. Smith's investigation, after searches and seizures, resulted in no prosecutions, but the retention of an innocent person's valuable property for an unreasonable period of time, termination of her employment, and no forum

to vindicate her name and rights, and was below reasonable professional standards.[6]

IX.

THE ORDER MISPERCEIVES THE POLITICAL NATURE OF THE CASE

The choice of president of a University is a matter of public concern. Gardetto v. Mason, 100 F.3d 803 (10th Cir. 1996). The Panel stated that "Sanchez did not identify the incidents to which she was referring, but apparently some occurred after she filed the lawsuit and were added to her amended complaint. These comments cannot support a claim of retaliation occurring before the comments were made." Order pgs. 7-8. This statement misapprehends the claim. The amended complaint states, "In March of 1996, two student members of the Student Senate were ejected from a senate meeting and suspended by Defendants Garza and Rael. Plaintiff Dorothy Sanchez took a visible and articulate position in support of these students, contrary to the positions held by Rael and Garza." Aplt. App. 5.

Juan Pena, a NMHU alumnus, Chairman of the Hispanic Round Table, a business group in Albuquerque, testified that Dorothy Sanchez appeared before the Hispanic Round Table. After Sanchez spoke to the Round Table, for approximately half an hour, Aplt. App. 754-5, they invited Appellee Rael down to rebut. Pena personally noted a

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[6]Smith never accounted for the May 3rd seizures by inventory, contrary to state law, Aplt. App. 185, 154. The Order does not discuss this.

perception in Rael that Sanchez was perceived to be a supporter of the anti-Rael faction. He understood it directly from his conversation with President Rael. Aplt. App. 643, 754. In addition, Sanchez spoke in support of students at a meeting. Aplt. App. 561, and spoke in favor of the national search, Aplt. App. 562. These comments are specifically stated, and, contrary to the Order, are identified.

The-political controversy or polarization on campus also is relevant to the issue of retaliation. Pena stated that Rael perceived Appellant to be anti-administration. Aplt. App. 755. If Rael retaliated for a perceived political reason, she would not need to show specific conduct.

Appellant did identify, at the inception of the investigation, Appellee Rael's statement that

> Dr. Trujillo has **led the movement against his administration.** That a faction of students and Dr. Trujillo demonstrate and are very outspoken. That people have complained in the past as to their aggressive manner. . . he also mentioned that a Martin Suazo was alleged to have been giving out the El Grito (not the El Nuevo Mexicana) and was making phone calls to **Dorothy Sanchez and Dr. Trujillo.**

Aplt. App. 79. The Panel's perception that her comments took place after her termination is incorrect. Appellant alleged slander resulting from comments made by NMHU personnel after her termination, see Aplt. App. 19, 20. Such statements are not part of her First Amendment retaliation claim. Rather, her criticism of the administration and Rael's

perception of her being allied with Dr. Trujillo satisfy that allegation.

X.

THE PANEL MISCONSTRUES THE FIRST OFFICE SEARCH

The Panel noted that the first office search the night of April 29th was done without police presence. Order at 5. It is uncontroverted that Smith went with Administrators Rogers and Baca. He claims to have remained right outside. Aplt. App. 574. The Fourth Amendment requires reasonable conduct regardless of whether or not the state employs police or administrators. O'Conner v. Ortega, 480 U.S. 709 (1987). The lack of reasonability is shown by the fact that this 24 years senior administrator was never questioned, interviewed, consulted regarding her knowledge of the flyer; nor questioned about the intervening issue of her use of school property. Assuming Appellees credibility that the deviation to investigate her allegedly improper use of the property was not pretextual, there was no reasonable basis for nighttime searches of either her office, or her home for property valued at some $500. Aplt. App. 277.

XI.

ADDITIONAL MATTERS

The Panel adopted as true Smith's claim that Sanchez was the subject of an "ongoing investigation." Smith has been transferred. There was no testimony from any other government agent. Sanchez cannot disprove a negative, and

it is unfair to require her to prove that there is no legitimate police investigation of her at this time. The Court should take notice that the police do not generally announce when they determine that they do not have a viable case against a suspect. In this case, however, Appellant was prepared to show that Smith stated that he had no case against the Appellant. Aplt. App. 489.

Finally, the Panel's disposition of the property right matter omits mention of the federal grant administrator's requirement of cause for termination, Aplt. App. 85, and the affidavit of former President Sanchez, Aplt. App. 627, which heighten the claim of implied contract. Garcia v. Middle Rio Grande Conservancy Dist., 121 N.M. 728, 918 P.2d 7 (1996).

CONCLUSION

Appellants respectfully request that the case be replaced on the calendar and resubmitted, or that the Court take any appropriate action to provide a full review of this matter.

Respectfully submitted,

/s/_____
JAMES A. BURKE
Attorney for Appellants
Post Office Box 9332
Santa Fe, New Mexico 87504
(505) 988-4657

Exhibit "1"

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

NO: CV 96-0934 BB/WWD
DOROTHY SANCHEZ, PH.D., INDIVIDUALLY AND AS NEXT FRIEND OF LISA SANCHEZ, A MINOR,

Plaintiffs,

-vs -

LIEUTENANT GARY SMITH, et al.

Defendants.

DEPOSITION OF GARY SMITH

VOLUME VI

March 24, 1998
9:00 a.m.
2200 Brothers Road
Santa Fe, New Mexico

PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURE, this deposition was:

TAKEN BY: MR. JAMES A. BURKE
ATTORNEY FOR THE PLAINTIFFS

REPORTED BY: Randy S. LaMar, CCR
NM CCR #117
Certified Court Reporter
190 Sheridan Avenue
Santa Fe, New Mexico 87501

* * *

[15]

Nuevo Mexicano.

Q. Did you seize more than two copies from Dorothy Sanchez' office?

A. No, only two of the E1 Nuevo Mexicano.

Q. You're sure of that?

A. As best as I can remember.

Q. The E1 Nuevo Mexicano copy, which we'll mark Exhibit 5,that's your handwriting, isn't it?

A. No, that is not.

(Exhibit NO. 5
marked for identification.)

Q. Whose writing is it?

A. That is Max's, Max Baca's handwriting.

Q. And he gave it to you?

A. Yes, sir.

Q. And what was the purpose of him producing this?

A. He produced that to show me what kind of computer program it would take to have made the El Nuevo Mexicano. So he was duplicating it for purposes of, I guess, to let me see what it looked like. For instance, he said, if I remember right, it was a Windows based, blah, blah, blah.

(Exhibit NO. 6.
marked for identification.)

* * *

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOROTHY SANCHEZ,
individually and as next friend
of Lisa Sanchez,

Plaintiff-Appellant,

v.

No. 98-2159
(D.C. No. CIV 96-934)
(D. N.M.)

GILBERT BACA, Captain; NEW MEXICO DEPARTMENT OF PUBLIC SAFETY; SELMINO RAEL, President, New Mexico Highlands University; MARGARET GARZA, DR.; GARY SMITH, Lieutenant; WILTON ROGERS; NEW MEXICO HIGHLANDS UNIVERSITY,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before **TACHA, BARRETT,** and **MURPHY,** Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Dorothy Sanchez, individually and as next friend of her daughter Lisa Sanchez, appeals from the order of the district court granting defendants' motions for summary judgment and denying her motion for summary judgment against defendant Gary Smith. We affirm.

Sanchez had been the director of student support services at New Mexico Highlands University (NMHU) for twenty-four years. She administered a program designed to assist first generation college students who were predominantly Hispanic. She was employed on a year to year contract.

In April 1996, a racially inflammatory flyer, "El Nuevo Mexicano," was circulated on campus. The New Mexico State Police, in conjunction with the New Mexico Department of Public Safety (collectively "NMDPS defendants"), began an investigation at the request of NMHU officials because the flyer threatened death and violence against certain faculty and administrative personnel.

In the course of this investigation, the police learned that Sanchez might be using NMHU equipment in her home, which was against NMHU policy. The police obtained three search warrants which resulted in one search of Sanchez' office and two searches of her home. Some equipment was found in her home. Falsified federal financial aid records and

other official NMHU documents were found in her office as well as multiple copies of the hate flyer. According to defendants, this matter remains under investigation by both state and federal law enforcement officials. After the equipment was found, in her home, the NMHU defendants placed Sanchez on suspension with pay and later gave her notice that her contract would not be renewed for the 1996-97 school year.

Sanchez then commenced this action in which she raised twenty-two claims, apparently under 42 U.S.C. § 1983, Title VII, and various state laws. She raised Fourth Amendment illegal search and seizure claims against the NMDPS defendants. She alleged the NMHU defendants violated her rights by suspending her with pay and by later not renewing her contract without proper due process-procedures. She also alleged her liberty and First Amendment rights were violated. Sanchez raised claims on behalf of her daughter against the NMDPS defendants alleging Fourth Amendment search and seizure violations during the first search, when her daughter was home.

The district court dismissed Sanchez' claims brought against the NMDPS defendants pursuant to the Fifth Amendment and her claims for abuse of process and malicious prosecution. Sanchez does not appeal this order. The court also granted all defendants' motions for summary judgment and denied her motion for summary judgment against defendant Lt. Gary Smith.

On appeal, Sanchez argues that her motion for summary judgment should have been granted. She also contends her Fourth Amendment rights were violated by the

searches as defendants had no probable cause for any of the searches, the searches were pretexual, and the first warrant was unreasonable. She states that the NMHU defendants conspired with the NMDPS defendants, violated her Fourth Amendment rights by searching her office, and violated her property right in continued employment, her First Amendment rights of free speech and association, and her liberty interests.

"We review the entry of summary judgment de novo, drawing all reasonable inferences in favor of the nonmovants." Hulsey v. Kmart, Inc., 43 F.3d 555, 557 (10th Cir. 1994). The moving party must show there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. See id. The nonmovant must establish, at a minimum, an inference of the presence of each element essential to the case. See id.

Sanchez asserts the NMDPS defendants violated the Fourth Amendment in searching her home twice and her office once. The first search of her home. appears to have been the result of Lt. Smith's conversation with several people about the threatening flyer, which first brought police presence to the campus at the administration's request. While speaking with Sanchez' secretary, Lt. Smith learned that Sanchez had taken some state property, including a computer, recorder, and associated items home and that she was performing hypnotherapy at her home as she had been told not to do it on campus. Lt. Smith verified that Sanchez did not have permission to take the equipment home. University officials then went to Sanchez' office, without police presence, to see if the equipment was there. It was not. Some NMHU equipment was found in Sanchez' home as a result of the search and-she was suspended with pay.

The second search warrant was issued for Sanchez' office. Lt. Smith had learned through interviews with various individuals, including Sanchez' secretary, that Sanchez had been altering documents, including W-2 forms and tax returns, apparently to qualify first generation students for scholarships when their family income was too high. The search warrant was issued to find those altered documents.

During the execution of the second search warrant, a large number of copies of the hate flyer was discovered and Lt. Smith sought another search warrant for Sanchez' home to look for threatening letters. Lt. Smith also had information that Sanchez may have been involved in distributing the flyer as 500 copies were unaccounted for on her copy card and students had been seen using that card to copy the flyer.

We review the sufficiency of the affidavit upon which a warrant is issued by looking at the totality of the circumstances and simply ensuring "that the magistrate had a substantial basis for concluding that probable cause existed." Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (quotation omitted). Probable cause means that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id. at 238.

We have reviewed the supporting affidavits contained in the appendix and conclude that each affidavit provided the magistrate with a substantial basis for concluding probable cause existed to justify the issuance of the warrants. Further, Sanchez has failed to show that the searches exceeded the warrants.

Sanchez has two main claims against the NMHU defendants. One is based on her suspension with pay and non-renewal of her employment contract. "Suspension with pay does not raise due process concerns." See Hicks v. City of Watonga, 942 F.2d 737, 746 n.4 (10th Cir. 1991) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 544-45 (1985); Pitts v. Board of Educ. of U.S.D. 305,869 F.2d 555, 556 (10th Cir. 1989)). No due process or liberty interests violations occurred due to Sanchez' suspension with pay.

Sanchez was employed pursuant to a year-to-year contract. That contract was not renewed. Sanchez has failed to show that she had a constitutionally protected property interest in her continued employment. "[A] nontenured school district employee 'must have more than a unilateral expectation [of continued employment]. He must, instead, have a legitimate claim of entitlement to it.'" Sullivan v. School Bd. of Pinellas County, 773 F.2d 1182, 1185 (11th Cir. 1985) (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)). In Sullivan, the court concluded that a teacher with a long employment history with the school may, under certain circumstances, have a legitimate claim to job tenure under certain circumstances.

Sanchez has not shown any such expectation. She therefore had no-protected property interest in her continued employment, nor has she shown any mutually explicit understanding sufficient to create such an interest.

Secondly, Sanchez alleged that the NMHU defendants violated her liberty and First Amendment rights because her suspension was in retaliation for her speech on matters of public interest. Sanchez did not identify the incidents to

which she was referring, but apparently some occurred after she filed the lawsuit and were added to her amended complaint. These comments cannot support a claim of retaliation occurring before the comments were made.

Sanchez' other allegations are vague. She stated that she was not offered the opportunity to clear her name prior to her suspension and that she was suspended "in retaliation for her association and speech on matters of public interest concerning University administration." App., Vol. 1 at 18. Later, she mentions flyers that were critical of the NMHU president and suspicions that she may have been involved with them. None of these conclusory accusations is sufficient to state a viable claim.

The remainder of Sanchez' claims arise out of these three main issues. She raised claims of trespass, conversion, a property right in the computer equipment as her personal items were on it, and Fourth Amendment violations on behalf of her daughter who was at home asleep during the first search. She has not stated any viable claim.

We have reviewed the parties' briefs, the appendices, and the district court's oral explanation of its judgment and its opinion. We conclude that the district court properly granted defendants' motion for summary judgment and denied Sanchez' motion for summary judgment. The judgment of the United States District Court for the District of New Mexico is AFFIRMED.

Entered for the Court

James E. Barrett
Senior Circuit Judge

APPENDIX F

IN THE DISTRICT COURT COUNTY OF SAN MIGUEL STATE OF NEW MEXICO

[Dated May 3, 1996]

STATE OF NEW MEXICO,
Plaintiff,

v.

DOROTHY SANCHEZ,
Defendant.

AFFIDAVIT FOR SEARCH WARRANT

Affiant being duly sworn upon his oath, states that I have reason to believe that in the following described premises, curtilage, building, and occupant, located in San Miguel County, State of New Mexico:

The office of Dorothy Sanchez, located in Las Vegas, New Mexico, County of San Miguel, on the New Mexico Highlands University, Felix Martinez Building, 8th and University, First Floor, Room #FMC118, northeast side of the building.

The residence is located at 2203 North Gonzales, Las Vegas, New Mexico, in San Miguel County, in the State of New Mexico. The premise is blue in color with a pitch roof

with blue siding; white trim on the house; the house is surrounded by a rod iron fence on the east side and a wooden deck; the house has a white block wall on the south side of the residence; the driveway is located on north side.

in the city or county designated above there is now being concealed: Computers, and their contents and memory, Typewriters, Documents, Printers, any other items used to make, alter, manufacture, delete, and/or change documents.

Affiant is Lieutenant Gary Smith of the New Mexico State Police, who is a full-time salaried police officer. Affiant is certified by the New Mexico Law Enforcement Academy, and has been employed as a police officer for seventeen years. Affiant is currently assigned to the District Two office in Las Vegas, New Mexico.

On or about April 29, 1996, at approximately 9:45 p.m. I along with Captain Gilbert Baca, Agent Robert San Roman, Sgt. Rodrigo Leal, Officer Toby Dolan, and two (2) other assisting officers executed a search warrant for the premises of Dorothy Sanchez. During the search, several items identified as NMHU university property were recovered.

Oh or about April 30, 1996, Dorothy Sanchez was placed on administrative leave from the University. Pursuant to University policy, on or about May 1, 1996, Dr. Margaret Garza, Ms. Sanchez' immediate supervisor, and Cathy Martinez entered the office of Dorothy Sanchez to begin the transition process. While sifting through NMHU documents, they came across a New Mexico Highlands University diploma in the name of William Dale Nolley, Dorothy

Sanchez' son, which appeared as if it had been altered. A substance commonly known as "white out" had been used to eliminate the original date. The date which was typed over appeared to be an "elite" print element from an electric typewriter and was placed over the area of issuance. The typed date was grossly incorrect.

Also found was a second document, a W-2 form, not belonging Dorothy Sanchez, which appeared to have been erased in area one area five. Ms. Garza confiscated the items and contacted myself. I secured the items as evidence.

On or about May 3, 1996, I contacted the registrar's office of New Mexico Highlands University and discovered that William Dale Nolley had received a diploma from the University, but the date was different from that of the suspected altered diploma.

I also spoke to several witnesses from the University, who stated that they had seen and had been ordered by Dorothy Sanchez to alter documents so that students could qualify for first generation financial assistance which consists of various loans, grants, scholarships, tutoring, typing, and other manners of financial assistance.

In an article which appeared on May 3, 1996, in the Albuquerque Journal, Journal North, Dorothy Sanchez acknowledged school equipment to her home.

WHEREFORE, your Affiant prays that this honorable Court issue a search warrant for the above-described premises and for such other relief as it deems just and proper.

/s/_____
Lt. Gary Smith
New Mexico State Police
District Two

Subscribed and sworn to or declared and affirmed to before me in the above named county of the State of New Mexico this 3rd day of May, 1996.

/s/_____
Judge Notary or Other
Officer Authorized to
Administer Oaths

Approved as to legal sufficiency:

/s/_____
Assistant District Attorney

IN THE DISTRICT COURT COUNTY OF SAN MIGUEL
STATE OF NEW MEXICO

[Dated May 3, 1996]

STATE OF NEW MEXICO,	)
Plaintiff,	)
	)
v.	)
	)
DOROTHY SANCHEZ,	)
Defendant.	)
	)

SEARCH WARRANT

THE STATE OF NEW MEXICO TO ANY OFFICER AUTHORIZED TO EXECUTE THIS WARRANT:

Proof by Affidavit for Search Warrant having been submitted to me, I am satisfied that there is probable cause that the person named or property described in the Affidavit is located where alleged in The Affidavit and I find the grounds exist for the issuance of the Search Warrant. A copy of the Affidavit is attached and made a part of this Warrant.

YOU ARE HEREBY COMMANDED to search forthwith the person or place in the Affidavit between the hours of 6:00 a.m. and 10:00 p.m., unless I have specifically authorized a nighttime search, for the person or property described in the Affidavit, serving this Warrant together with a copy of the Affidavit, and making the search and if the person or property

be found there, to seize the person or property and hold for safekeeping until further order of the Court.

You are further directed to prepare a written inventory of any person or property seized. You are further directed to file the return and written inventory with the Court promptly after execution.

5/3/96 /s/_____

Date Judge

AUTHORIZATION FOR NIGHTTIME SEARCH

I further find that reasonable cause has been shown for nighttime execution of this Warrant. I authorize execution of this Warrant at any time of the day or night for the following reasons:

_____

Judge

STATE OF NEW MEXICO, COUNTY OF SAN MIGUEL
STATE OF NEW MEXICO

[Dated May 3, 1996]

STATE OF NEW MEXICO,	)
Plaintiff,	)
	)
v.	)
	)
DOROTHY SANCHEZ,	)
Defendant.	)
	)

AFFIDAVIT FOR SEARCH WARRANT

Affiant, being duly sworn, upon his oath, states that I have reason to believe that in the following described premises, curtilage, building, and occupant, located in San Miguel County, State of New Mexico:

The office of Dorothy Sanchez, located in Las Vegas, New Mexico, County of San Miguel, on the New Mexico Highlands University, Felix Martinez Building, 8th and University, First Floor, Room #FMC118, northeast side of the building.

The residence is located at 2203 North Gonzales, Las Vegas, New Mexico, in San Miguel County, in the State of New Mexico. The premise is blue in color with a pitch roof with blue siding; white trim on the house; the house is surrounded by a rod iron fence on the east side and a wooden

deck; the house has a white block wall on the south side of the residence; the driveway is located on the north side.

in the city or county designated above there is now being concealed: flyers, documents, papers, all information utilized and entered into the New Mexico Highlands University computer system by Dorothy Sanchez and support staff members.

Affiant is Lieutenant Gary Smith of the New Mexico Police, who is a full-time salaried police officer. Affiant is certified by the New Mexico Law Enforcement Academy, and has been employed as a police officer for seventeen years. Affiant is currently assigned to the District Two office in Las Vegas, New Mexico.

On May 3, 1996, I along with Sgt. Tom Dobson and an employee of New Mexico Highlands University, Cathy Martinez, executed a search warrant on the office of Dorothy Sanchez on the campus of New Mexico Highlands University. While executing the warrant, I discovered copies of suspected hate mail; i.e.; "El Nuevo Mejicano" which has been circulating the university and community.

I spoke with Max Baca, who is the computer expert employed with New Mexico Highlands University. He has explained and demonstrated differences in copy and clarity. Based on the information he provided, I identified the copy of "El Nuevo Mejicano" as a much superior copy to those which have been circulated. The quality of The print was also bolder and clearer then those which have been identified previously. The printer has been identified as a Canon

colored jet printer which has been seen in the home of Dorothy Sanchez.

Also found were numerous copies of "El Grito", another hate document which has been circulated on the university and the community. The print on this document appears to be similar to that of the "El Nuevo Mejicano"

WHEREFORE, your Affiant prays that this honorable Court issue a search warrant for the above-described premises and for such other relief as it deems just and proper.

/s/_____
Lt. Gary Smith
New Mexico State Police
District Two

Subscribed and sworn to or declared and affirmed to before me in the above named county of the State of New Mexico this 3rd day of May, 1996.

/s/_____
Judge, Notary or Other
Officer Authorized to
Administer Oaths

Approved as to legal sufficiency:

/s/_____
Assistant District Attorney

IN THE DISTRICT COURT COUNTY OF SAN MIGUEL STATE OF NEW MEXICO

[Dated May 3, 1996]

STATE OF NEW MEXICO,	)
Plaintiff,	)
	)
v.	)
	)
DOROTHY SANCHEZ,	)
Defendant.	)
	)

SEARCH WARRANT

THE STATE OF NEW MEXICO TO ANY OFFICER AUTHORIZED TO EXECUTE THIS WARRANT:

Proof by Affidavit for Search Warrant, having been submitted to me, I am satisfied that there is probable, cause that the person named or property described in the Affidavit is located where alleged in The Affidavit and I find the grounds exist for issuance of the Search Warrant. A copy of the Affidavit is attached and made a part of this Warrant.

YOU ARE HEREBY COMMANDED to search forthwith the person or place in the Affidavit between the hours of 6:00 a.m. and 10:00 p.m., unless I have specifically authorized a nighttime search, for the person or property described in the Affidavit, serving this Warrant together with a copy of the Affidavit, and making the search and if the person or property

be found there, to seize the person or the property and hold for safekeeping until further order of the Court.

You are further directed to prepare a written inventory of any person or property seized. You are further directed to file the return and written inventory with the Court promptly after its execution.

5/3/96 /s/_____

Date Judge

AUTHORIZATION FOR NIGHTTIME SEARCH

I further find that reasonable cause has been shown for nighttime execution of this Warrant. I authorize execution of this Warrant at any time of the day or night for the following reasons:

_____

Judge

(2)

No. 99-688

IN THE
SUPREME COURT OF THE UNITED STATES

DOROTHY SANCHEZ, individually and as next friend of Lisa Sanchez,

Petitioner,

v.

LIEUTENANT GARY SMITH, CAPTAIN GILBERT BACA, NEW MEXICO DEPARTMENT OF PUBLIC SAFETY; SELIMO RAEL, PRESIDENT OF NEW MEXICO HIGHLANDS UNIVERSITY, DR. MARGARET GARZA, WILTON ROGERS, NEW MEXICO HIGHLANDS UNIVERSITY, Individually and in Their Official Capacities,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Summary Judgment in favor of the Respondent New Mexico Public Safety Department was proper, when the record taken as a whole could not lead a rational trier of fact to find for the Petitioner, thereby precluding a trial on the merits?

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JURISDICTION

Dorothy Sanchez, individually and as next friend of Lisa Sanchez, filed her petition for writ of certiorari, appealing the order issued by the United States Court of Appeals for the Tenth Circuit which denied her Petition for Rehearing with Suggestion for Rehearing En Banc entered on July 23, 1999. On June 9, 1999, the Tenth Circuit affirmed the Judgment of the United States District Court for the District of New Mexico and its Order Granting Summary Judgment in favor of the Respondents. The Petition for Writ invoked the jurisdiction of this Court under 28 U.S.C. 1254(1) and 2106, seeking review of the Tenth Circuit's order and judgment. These Respondents oppose certiorari jurisdiction and their argument is set forth in their Reasons for Denying Writ.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment and the Fourth Amendment to the United States Constitution are applicable. The Fifth Amendment does not apply to this action. Although Fifth Amendment claims were initially brought against these Respondents, such claims were dismissed by the United States District Court for the District of New Mexico and are not the subject of any appeal. App. E at 43a.

STATEMENT OF THE CASE

The New Mexico Department of Public Safety was contacted by Highlands University to conduct an investigation into the creation and dissemination of a threatening flyer entitled "El Nuevo Mexicano" targeting Highlands University

faculty members and which created an atmosphere of fear on the campus because they threatened bodily harm and were very direct. Aplt. App. at 295, 276, 352 pp. 42-43. Captain Gilbert Baca, Area Commander for the New Mexico State Police District Office, located in Las Vegas, assigned the investigation to Lt. Gary Smith. Aplt. App. at 295, 296. Lt. Smith was responsible for the actual investigation and the manner in which it would be conducted. During the course of Lt. Smith's investigation of the threat letter, criminal allegations involving Dorothy Sanchez were brought to Lt. Smith's attention. As a police officer, Lt. Smith had an affirmative duty to investigate those allegations. Aplt. App. at 301 and 394 p. 48. There were three search warrants served on Dorothy Sanchez, two at her home and one at her office. Petitioner does not raise any issues regarding Search Warrant #1.

SEARCH WARRANT #2

The day after the execution of Search Warrant #1, Dorothy Sanchez was placed on administrative leave with pay from the University. Aplt. App. at 360-361. Dr. Garza found a Highlands University Diploma was issued to William Dale Nolley, Ms. Sanchez's son. The date had been altered by using "white out". Lt. Smith confirmed with the registrar's office that William Dale Nolley had a Highlands University diploma but with a different date than the one found in Ms. Sanchez's office. She also found W-2 forms, issued to someone other than Dorothy Sanchez, in which the numbers appeared to have been erased. Aplt. App. at 323 p. 112; 324 pp. 113-116.

Kathy Martinez, an employee of the university who worked under Dorothy Sanchez, had informed Lt. Smith that

she had been directed, by Dorothy Sanchez, to change a student's grades. Aplt. App. at 329; 330-332. She also told Lt. Smith that she had been ordered by Dorothy Sanchez to alter documents so that students could qualify for first generation financial assistance. Aplt. App. at 343. Kathy Martinez also advised Lt. Smith that she had information from other support services staff that Ms. Sanchez had directed them to amend tax forms so their child could qualify for financial aid. Aplt. App. at 345-346; 410. After Lt. Smith was informed of the altered documents, he consulted with the district attorney who prepared the affidavit which he used when he obtained another search warrant (Search Warrant #2) for Dorothy Sanchez's office on May 3, 1996. Aplt. App. at 392 p.36.

SEARCH WARRANT #3

During the execution of the Search Warrant #2, at Dorothy Sanchez's office, Lt. Smith discovered copies of the suspected hate flyer, "El Nuevo Mexicano", as well as the El Grito and El Machete. They appeared to be either an original or a copy that was superior to those being circulated around the campus. Lt. Smith determined that he needed to get Search Warrant #3. Ms. Sanchez's office contained a very large number of copies and the copies were the best copies he had seen anywhere. Aplt. App. at 396 p. 107, 115; 287-290. The third search warrant for Dorothy Sanchez' home was based on what Lt. Smith found earlier that day at the office. Aplt. App. at 395 p. 103. Lt. Smith had probable cause to look for El Grito and El Nuevo Mexicano. Aplt. App. at 396 p. 105-107.

The subject of this third search warrant was for the threatening letters. Dorothy Sanchez had become a suspect in

the distribution of the threatening flyer and other hate letters. Prior to obtaining the search warrant, Michael Dominguez informed Lt. Smith that there were students copying the El Grito and using Dorothy Sanchez's copying card. The following day, Kathy Martinez verified they could not account for 500 copies. Aplt. App. at 314-318; 337-339. Fred Stoessel also told Lt. Smith that he had asked Dorothy Sanchez for a copy of El Nuevo Mexicano. When he went to get one, she had a stack two or three inches thick. Aplt. App. at 365 p.9.

Lt. Smith informed the Assistant District Attorney, Abigail Aragon, that Dorothy Sanchez had a large number of copies of the hate mail and it was unique because it was the best copies anywhere. Aplt. App. at 396 p. 107. A Canon jet printer in her home had the capability of producing the original El Nuevo Mexicanos that were distributed around campus. Max Baca who was familiar with the capabilities of the jet printer told Lt. Smith that Dorothy Sanchez' bubble jet printer was capable of producing the document. Aplt. App. at 396 p. 107; 397 p. 112; 399 p. 117-118; 387-390.

The Affidavit for search warrant #3 was again prepared by the District Attorney's office. Lt. Smith gave the prepared inventory and return of service for search warrants #2 and #3 to the District Attorney, as requested. He expected the district attorney's office to file them in District Court. Aplt. App. at 400 p. 121; 401 pp. 130-131; 287-290. Assistant District Attorney Abigail Aragon had prepared a Motion to Seal Affidavit for Search Warrant, Search Warrant and Return and the corresponding Order. Aplt. App. at 214,215.

As far as Lt. Smith knew, law enforcement did not have anyone with a computer crimes expert who could make

a mirror image of Dorothy Sanchez's computer. It wasn't until December of 1996 that the Albuquerque Police Department developed a high tech crime unit. That was why the Plaintiff Dorothy Sanchez did not get her computer back until March 5, 1997. Aplt. App. At 396 p. 108; 400 p. 124.

REASONS FOR DENYING WRIT

Rule 10 of the Rules of the Supreme Court of the United States specifically states in part that "[A] petition for a writ of certiorari will be granted only for compelling reasons". It also advises that "[R]eview on a writ is not a matter of right, but of judicial discretion". Furthermore, the rule also provides that "[A] writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law."

This Petition for Writ of Certiorari has not satisfied the requisite criteria to justify review by the United States Supreme Court. Rather, the Petition rests on the arguments of incomplete consideration of the record (Pet. at 7); the misapprehension of the facts of the case by the Tenth Circuit Court of Appeals (Pet. at 7,8), the amount of facts provided for consideration by the Court (Pet. at 8); the Court of Appeal's failure to specifically address each of the Petitioner's sub-issues and arguments (Pet. at 11); reargues the same sub-issues raised before the District Court and the Court of Appeals (Pet. at 12,13,18 and 21); and issues of admissibility of the evidence raised for the first time in this forum. (Pet. at 10)

A Writ of Certiorari is not granted merely to review the evidence of inferences drawn from it, nor where there is no conflict between the decisions of the circuit courts of

appeals. General Pictures Co. v. Electric Co., 304 U.S. 175 (1938). It is not for the United States Supreme Court to reverse a Court of Appeals because if it had been in the place of the Court of Appeals, it would find the record tilting one way rather than the other. NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 503 (1951).

Certiorari is granted only "in cases involving principals the settlement of which is of importance to the public as distinguished from parties and in the cases where there is real and embarrassing conflict of opinion and authority between the Courts of Appeals." Id. at 502. One of the principal purposes of certiorari jurisdiction is to resolve conflicts among the United States Courts of Appeals concerning the meaning of provisions of federal law. Braxton v. United States, 500 U.S. 344, 347 (1991). The subject Petition for Writ does not encompass any of these criterion.

Petitioner's argument that this court has reversed and remanded courts where fundamental rights or clear legal violations have been misapprehended by lower courts is neither supported by Petitioner's reference to Oestereich v. Selective Service Local Board, 390 F.2d 100 (10th Cir. 1968), rev'd 393 U.S. 233 (1968) nor to the issues and circumstances of this case.[1] Oestereich, involved the first interpretation of §10 (b)(3) of the Military Selection Service Act of 1967 and whether pre-induction review was precluded as it applied to the facts of that particular case. The Court's rationale addressed a statutory mandate, the interpretation of the Selective Service Board's actions and whether or not such

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[1] Oestereich was erroneously cited in Petitioner's Writ at page 7, as 390 F.2d 100 (10th Cir. 1968), rev'd, **396 U.S. 460 (1969)**.[Emphasis Added]

actions were a procedure allowed by the regulations. This case involved what the Supreme Court stated as a "clear departure by the Board from its statutory mandate". Id. at 238. In its Order and Judgment, the Court of Appeals did not decide an important federal question that has not been or should be settled by this Court. See Rule 10(c) of the Supreme Court Of The United States.

Breen v. Selective Service Local Board, 396 U.S. 460 (1970) involved the same set of circumstances as Oestereich. The District Court granted the Motion to Dismiss and the Court of Appeals affirmed. While this appeal was pending, the United States Supreme Court rendered its decision in Oestereich. Even though Petitioner relied on Oestereich, the Court of Appeals affirmed the District Court's dismissal of the suit. The Supreme Court granted certiorari because it concluded that Oestereich governed petitioner's case. Again, this is not the case before the Court.

It is not for this United States Supreme Court to second guess the basis and considerations of the Tenth Circuit Court of Appeal's decision which was based on its review of the parties' briefs, the appendices, the district court's oral explanation of its judgment, the district court's opinion and the separate reply briefs. App. E. at 47a and App. D at 19a. The Tenth Circuit's Order and Judgment is not in conflict with any other circuits or with the United States Supreme Court. Likewise, this matter does not involve matters of great legal importance to the public that need to be addressed by this Court.

ARGUMENT

I. The United States Court of Appeals For The Tenth Circuit considered the Petitioners' Reply Briefs prior to issuing its decision.

In its Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc, the Court of Appeals specifically states that the separate reply briefs were reviewed by the panel before it issued its decision. (App. D at 19a) This statement invalidates Petitioners claim that the Court of Appeals Rule 31.4 which discourages separate briefs by non-government parties may have caused incomplete consideration of the appeal.

II. The award for summary judgment in favor of these Respondents does not automatically present a depravation of a fundamental right or clear legal violation.

The Federal District Court found the New Mexico Department of Public Safety Defendants were entitled to qualified immunity for the Plaintiffs' fourth cause of action (4/29/96 search was pretextual and unreasonable; 5/3/96 search of home lacked probable cause, was unreasonable, was a general search; based on pretextual and false statements) fifth cause of action (unreasonable length of time in retaining goods causing the Plaintiffs damage); tenth cause of action (5/3/96 searches and seizures were invalid and violated Plaintiffs' fourth amendment rights because warrants were never returned nor inventory timely made, filed or served), among other state claims. App. B at 11a; C.A. Resp. B. p.12)

In essence, the Petitioner's recurrent Fourth Amendment arguments have not made any substantive transitions to support her writ which purports to argue that the award of summary judgment in favor of these Respondents is tantamount to the automatic deprivation of a fundamental right or that such amounts to a clear legal violation.

One of the consistent complications in the procedural history of this matter is the Petitioners' subjective assessment of select information, groundless or leaping conclusions and editorial comments not otherwise found in the evidence established through discovery. (C.A. Resp. B. p. 3) It was the Petitioner's burden to produce and designate for the lower courts the "specific facts showing that there is a genuine issue for trial". Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The Petitioner had the burden of establishing, at a minimum, an inference of the presence of each element essential to the case. Hulsey v. Kmart, Inc., 43 F.3d 555, 557 (10th Cir. 1994). In short, the Petitioner never met her burden.

The district court's function was to determine whether there was a genuine issue for trial, not to weigh the evidence and determine the truth of the matter. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986) There is no genuine issue for trial, when the record ***taken as a whole*** could not lead a rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) [Emphasis Added] The quantity of facts is not a consideration in motions for summary judgment.

The United State District Court properly applied the law to the issues raised in the Second Motion to Dismiss or

Alternatively, Motion for Summary Judgment and Qualified Immunity. After reviewing the sufficiency of the supporting affidavits in light of the totality of the circumstances, the Court of Appeals held that each supporting affidavit provided the magistrate with a substantial basis for concluding probable cause existed to justify the warrants. The court also held that Petitioner failed to show that [as a matter of law] the searches exceeded the warrants. App. E. at 45a.

Petitioner never raised her issue that various "charges" were inadmissible hearsay in any of the lower courts. The absence of any argument or authority on the issue would be deemed the matter abandoned and it should not be addressed on appeal. Farthing v. City of Shawnee, Kan., 39 F.3d 1131 (10th Cir. 1994) Therefore, this new issue of inadmissible hearsay was abandoned before it ever reached the Court of Appeals and cannot be raised for the first time on writ for certiorari.

CONCLUSION

For the foregoing reasons, the Court of Appeals properly affirmed Judgment and Order granting summary judgment in favor the Respondents. There are no compelling reasons for which this Court should grant certiorari. Therefore, Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 22 1999
OFFICE OF THE CLERK

No. 99-688

IN THE
SUPREME COURT OF THE UNITED STATES

DOROTHY SANCHEZ, individually and as next friend of Lisa Sanchez,

Petitioner,

v.

LIEUTENANT GARY SMITH, CAPTAIN GILBERT BACA, NEW MEXICO DEPARTMENT OF PUBLIC SAFETY; SELIMO RAEL, PRESIDENT OF NEW MEXICO HIGHLANDS UNIVERSITY, DR. MARGARET GARZA, WILTON ROGERS, NEW MEXICO HIGHLANDS UNIVERSITY, Individually and in Their Official Capacities,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant a petition for writ of certiorari when the only asserted error is that the District Court and Court of Appeals below may have failed to consider all of petitioner's factual assertions or misinterpreted such facts?

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JURISDICTION

The considerations governing this Court's jurisdiction on a writ of certiorari are enumerated in Rule 10 of the Rules of the Supreme Court of the United States. That rule provides, in relevant part, "A petition for writ of certiorari will only be granted for compelling reasons." The rule then follows with the character of the reasons this Court considers when reviewing a petition for a writ of certiorari. The first reason discussed is in the circumstance where a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals. The Petitioner herein has made no such assertion as a reason for seeking review by certiorari. The next enumerated reason deals with the situation where a petitioner is seeking review from a state court ruling which situation is factually inapplicable here. Lastly is the circumstance in which a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court. The Petitioner has not made such an assertion but, rather, argues throughout the petition that the lower courts made factual errors or that summary judgment should not have been granted due to the number of alleged facts involved. Rule 10 addresses this situation by providing "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The Petitioner has failed to present this Court with any compelling reason to grant the requested writ of certiorari.

STATEMENT OF THE CASE

Petitioners Dorothy Sanchez and her daughter Lisa Sanchez (hereinafter collectively "Sanchez") sued New Mexico Highlands University (hereinafter the "University") and certain individuals employed by the University, namely the President of the University, Selimo Rael, the former Dean of Students, Dr. Margaret Garza, and the Director of Human Resources, Wilton Rogers (collectively the "Highlands Defendants"). Sanchez also sued the New Mexico State Police and certain individuals employed by the New Mexico State Police, who are represented by separate counsel. Sanchez brought her action alleging violations under 42 U.S.C. Section 1983 and violations of numerous state law claims.

Sanchez was employed as the director of the Student Support Services program at the University. Her last contract with the University began on September 1, 1995 and terminated August 31, 1996. Aplt. App. 526. The term of the contract was for one year only and terminated on August 31, 1996. Aplt. App. 526.

During Sanchez' last contract with the University, the University became aware of numerous performance deficiencies which existed on the part of Sanchez, including but not limited to: the use of vulgar language to her supervisor Dr. Garza; the conduction of hypnosis on students even though hypnosis was not allowed by the terms of the federal grant which funded the program or by University policy; bailing students out of jail; the allowance of the housing of inmates from the New Mexico Springer Boys School at the University without securing their admission; and numerous other matters. Aplt. App. 540; Aplt. App. 529, p. 18, L. 21-25; p. 19, L. 1; Aplt. App. 533, p. 57, L. 17-20;

Aplt. App. 534, p. 74, L. 10-16; Aplt. App. 535, p. 81, L. 20-25, p. 82, L. 1-3.

Sanchez was directed to cease doing hypnosis on students. Aplt. App. 529, p. 18, L. 21-25; p. 19, L. 1; Aplt. App. 530, p. 23, L. 9-12. In order to substantiate her claim that the Student Support Services grant allowed her to perform hypnosis, Sanchez produced to her supervisor what she represented to be two pages from the grant as approved by the Department of Education in Washington, D.C., which pages contained references to the performance of hypnosis by the director of the program. Aplt. App. 530, p. 24, L. 7-12. The Department of Education confirmed that the pages containing the references to hypnosis were different from those contained in the official grant approved by the Department and that nowhere did the department find any reference to hypnosis in the grant. Aplt. App. 540. Sanchez had therefore altered and falsified the grant document.

Sanchez was provided notice that her contract as director of Student Support Services, which was due to terminate on August 31, 1996, would not be renewed.

In April 1996, a radical Chicano flyer was distributed on the campus of the University, which flyer threatened death, violence, physical harm and property damage against certain named faculty members and University administrative members. The flyer began as follows:

> No More! Those Raza who have used the EL MACHETE to protect and defend sell out Chicanos and Chicanas, must stop, you are abusing the purpose of the MACHETE. RAZA, you must pick your battles carefully. Selimo Rael is the first target in our mission to

> save Highlands. Once we have destroyed this sell out we can then turn our forces against the gringo pigs who think that they will take over this school. Let them believe that we are to [sic] busy fighting with each other, then when the moment comes we can mobilize the Mexican Mafia to burn the gringos homes and families. The gringo does not realize how violent this community can be to outsiders who fuck with us. Hey gringos, look into how many unsolved deaths take place in San Miguel County. Some of these gringos live out in the country, where it takes a long time for the police or fire department to reach them in case of an emergency. We have not forgotten about gringo pigs like: Green, Olsen, Bingham, Clinger, Paradise, Springer and Williams but we must first clean our own back yard.

Aplt. App. 553.

The University requested of law enforcement officials, including the Attorney General's Office and the New Mexico State Police, that an investigation be conducted regarding the flyer. Aplt. App. 563, 564. In the course of conducting its investigation, the New Mexico State Police conducted many interviews and, pursuant to one of the interviews, learned that Sanchez had purchased certain items of equipment for her own benefit with New Mexico state funds and had taken the equipment home. Aplt. App. 569, p. 38, L. 2-3; Aplt. App. 570, p. 71, L. 23-25; p. 72, L. 1-25. The State Police defendants had never met Sanchez and knew nothing of her prior to initiating their investigation. Aplt. App. 568, p. 25, L. 6-9.

The New Mexico State Police informed University officials that they had learned that Sanchez had purchased equipment with state funds and taken the equipment to her home. The University administration indicated that it had not given permission for the purchase of such equipment. Aplt. App. 556, p. 51, L. 23-25; p. 52, L. 1-3; Aplt. App. 557, p. 56, L. 2-5. The State Police obtained a search warrant from State District Judge Harris for the search of Sanchez' home. Aplt. App. 571. The search did result in the discovery of the equipment at Sanchez' home which had been purchased by Sanchez with state funds. The University was informed of the results of the search. Aplt. App. 558, p. 64, L. 11-14.

Upon being informed that the equipment was indeed found at the home of Sanchez, the Director of Human Resources placed Sanchez on suspension from her employment, with pay. Aplt. App. 575, p. 24, L. 16-18. The University had also been informed, by that time, that there were allegations regarding Sanchez' falsification of tax returns and federal income tax information submitted in order to qualify otherwise ineligible students for federal and state financial aid and, thus, the notice to Sanchez indicated that she was under investigation for purchasing equipment with state funds and for other matters. Aplt. App. 576.

Subsequently, the State Police obtained a search warrant in order to search Sanchez' home again and in order to search Sanchez' office. The University Defendants were not informed in any way regarding these searches, except that as a courtesy they were told that the State Police had obtained a warrant to search Sanchez' office on campus. Aplt. App. 577, 578. Sanchez had been implicated by certain individuals who were interviewed by the State Police as a possible author of the threatening flyer. In fact, she had previously authored an anonymous flyer, while employed at the University,

entitled "Juicy Lucy Does Highlands." The flyer was directed against another University employee and accused her of sexual favors in return for job security or promotion. Aplt. App. 718.

The University was subsequently informed that an investigation was ongoing by the United States Attorney's Office regarding Sanchez arising out of her work at the Student Support Services office at Highlands. In June 1996, the University was served with a subpoena for the production of certain documents before a grand jury which convened in Albuquerque, New Mexico. Aplt. App. 580, 581. Subsequently, in September 1997, the University received another subpoena for documents to be produced to the grand jury at the request of a United States Attorney. The subpoena was for documents relating to the Student Support Services office and Sanchez. Aplt. App. 582, 583.

ARGUMENT

I. There is Nothing in the Record to Indicate that the Court of Appeals Rule Requiring Petitioner to File a Single Brief and Allowing the Governmental Entities to File Separate Briefs May Have Caused Incomplete Consideration of the Appeal.

The Petitioner alleges that Rule 31.4 of the Rules of the Tenth Circuit requiring all parties on one side of a case to join in a single brief to the greatest extent practicable, except as to governmental entities, may have somehow prejudiced the Petitioner, with nothing more than speculation to substantiate that assertion. In fact, the Petitioner filed separate reply briefs which were considered and allowed by the Tenth Circuit. The Petitioner claims that because the reply briefs

were filed by the clerk the same day that Petitioner's motion for rehearing was denied, that somehow the Tenth Circuit did not have sufficient time to consider the briefs. In fact, the Court's Order states that both reply briefs were reviewed by the panel prior to issuing its decision. Pet. App. 19a. The Petitioner also asserts that the Tenth Circuit may have had insufficient time to consider the facts in any of her briefing, including, apparently, her brief in chief as well as the lengthy appendix. There is absolutely nothing in the record or any evidence to indicate that the Tenth Circuit did not adequately and properly perform its appellate function in this case. To the contrary, the Tenth Circuit's order states: "[w]e have reviewed the parties' briefs, the appendices, and the district court's oral explanation of its judgment and its opinion." Pet. App. 8a.

II. Summary Judgment Was Properly Granted and Affirmed Despite Petitioner's Assertion That This a "Fact Intensive" Case.

The Petitioner claims that because of the number of facts she believes are relevant in this case, that summary judgment and the affirmance thereof were improperly granted. The Petitioner also claims that alleged factual disputes and the breadth of facts made "digestion by the reviewing court difficult." The reviewing court, however, never indicated that it had any difficulty in digesting the "breadth of facts." It is, of course, well settled that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. In addition, the substantive law will identify which facts are material for purposes of summary judgment, as only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment and factual disputes that are irrelevant or

unnecessary will not be considered. Also, when ruling on a motion for summary judgment, the mere existence of a scintilla of evidence in support of a plaintiff's position will not be sufficient. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Anderson v. Liberty Lobby, *id.*, does not state, as the Petitioner alleges, that summary judgment "is to be used sparingly in fact intensive cases."

A writ of certiorari is not properly granted in this circumstance where the petitioner seeks a review of the evidence or inferences drawn therefrom. General Pictures Co. v. Electric Co., 304 U.S. 175 (1938). It is not for the Supreme Court to reverse a Court of Appeals based on a conflict of evidence. In such situations the Supreme Court adheres to the "usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 503 (1951).

III. Petitioner's Assertion of Erroneous Factual Findings is Insufficient to Warrant the Grant of a Writ of Certiorari.

The Petitioner argues that her claim of First Amendment retaliation was improperly dismissed. Petitioner claims that despite her "faultless, 24 year career,"[1] her contract was not extended because the University administration had knowledge from a Mr. Peña that the University was "not [to] retaliate against Petitioner." Pet. 9. Noticeably, the Petitioner does not point to anything in the

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[1]The Statement of the Case, supra, provides references in the record to the performance deficiencies on the part of Sanchez.

record indicating that the University administration was aware of any comments, if made, by the Petitioner. The Court of Appeals dealt specifically with this claim and found that the Petitioner's "conclusory allegations" were insufficient to state a viable claim. Pet. App. 7a. In any event, the Petitioner is again asserting only an alleged factual finding.

The Petitioner's counsel also represents to this Court, with no substantiation, that his client has submitted to an interview with the U.S. Attorney's Office and no charges against Sanchez have been filed. Petitioner states that the Court of Appeals referred to her as being "still under investigation," when in fact the Court of Appeals recited only that the defendants asserted that "this matter [falsified federal financial aid records and other documents] remains under investigation." Pet. App. 3a. The Petitioner claims that the Respondents never did produce any evidence reflective of criminal activity. However, the record reflects that the University responded to two subpoenas to produce documents from the office which the Petitioner headed. Moreover, it was not up to the University to make charges against Sanchez or to evaluate whether criminal activity had occurred. The University knew only that the Petitioner was, and may still be, under investigation.

As to the Highlands Defendants, the Petitioner makes one final argument which is that the Court of Appeals did not discuss certain evidence presented by the Petitioner regarding her claim that she had a property interest in her employment and that because such evidence was not discussed, a petition for writ of certiorari must be granted. There is, however, no indication in the record that the Court of Appeals did not sufficiently review this case and, moreover, Petitioner has cited to no requirement that a court of appeals discuss every argument made by an appellant in its orders and judgments.

The Court of Appeals directly addressed this claim and found that: "Sanchez has failed to show that she had a constitutionally protected property interest in her continued employment." Pet. App. 6a.

CONCLUSION

Because the Petitioner has failed to present any compelling reason as to why this Court shouid grant her petition for writ of certiorari and seeks only to re-argue the facts of her case, the petition should be denied.

Respectfully submitted,

/s/_____
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